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Wisconsin. Supreme Court

WISCONSIN REPORTS

108

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

OCTOBER 30, 1900—FEBRUARY 1, 1901.

FREDERIC K. CONOVER
OFFICIAL REPORTER

CHICAGO
CALLAGHAN AND COMPANY
1901

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

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IN MEMORIAM.

DEATH OF JOHN T. FISH.

On the 10th day of January, 1901, Judge Charles E. Dyer of Milwaukee addressed the court as follows:

May it please the Court:— I am deputed by the bar association of Milwaukee to present to this court the memorial adopted by the association, commemorative of the life and death of Mr. JOHN TRACY FISH, whose eminence at the bar amply justifies public recognition of the sorrowful event which terminated his earthly career.

I read the memorial:

Memorial of the Milwaukee Bar Association.

The bar association of Milwaukee, being profoundly moved by the sad dispensation which has forever removed from its midst JOHN T. FISH, one of its most eminent and worthy members, has assembled to give expression to its sentiments of sorrow and to do honor to the memory of the departed brother.

Mr. FISH was born at Lake Pleasant, Hamilton county, New York, November 8, 1834. He came from an old and respected New England family, and inherited powers of mind and force of character and purpose which moved him to the successful career of his life. He worked upon his father's farm until he was twenty years of age, and his attendance at the district schools, and one term in the Kingsborough Academy, compassed all of his training in the schools during this period. In the fall of 1855 he settled at Lake Geneva, Wisconsin, where he remained until the fall of 1857, when he removed to McHenry, Illinois. Here, while engaged in agricultural and other labors, he also pursued his legal studies, and was enabled in July, 1859, to obtain admission to the bar in the circuit court of Walworth county, Wisconsin. He began the practice of his profession at Sharon in that county. In August, 1861, he enlisted as a private in Company C, Thirteenth Wisconsin Volunteer Infantry, and when the organization was perfected was chosen as its second lieutenant. He remained in the service during the war of the Rebellion, and was mustered out December 26, 1865, as captain of his company, when he returned to Sharon and resumed the practice of his profession. Here he remained until 1867, when he left Sharon

and went to Burlington, Racine county, Wisconsin. In 1868 he was elected district attorney and moved to Racine, which office he held for two terms. In 1871 Mr. FISH became associated with Charles H. Lee under the firm name of Fish & Lee. After seven years Mr. Lee retired from the firm and the subject of this memorial formed another partnership with J. E. DODGE, now one of the associate justices of the supreme court of Wisconsin. In May, 1884, his son, Frank M. Fish, became a member of the firm, the style of which was then Fish, Dodge & Fish. In October, 1885, our deceased brother removed to Milwaukee and entered the firm of Jenkins, Winkler & Smith, where he remained until he was called to the position of general solicitor of the Chicago, Milwaukee & St. Paul Railway Company in 1887. This position he filled, first with headquarters at Milwaukee and afterwards at Chicago, until February 1, 1894, when he resigned, returned to Milwaukee, and associated himself with Alfred L. Cary and resumed general practice, the style of the firm being Fish & Cary. In May, 1897, the surviving member of the old law firm of Wells, Brigham & Upham and Fish & Cary formed a new firm under the style of Fish, Cary, Upham & Black, at the head of which firm our brother remained until the time of his death. While a member of this last firm he had the management of the entire legal business of the Chicago & Northwestern Railway Company within the state of Wisconsin.

This is a brief epitome of the life and career of our deceased brother. In his death this association and the legal profession have lost a most able and learned member. He was a man of tireless industry, great force, irreproachable integrity, and broad attainments. Possessed of a strong physical constitution and of an acute and active mind, he was able easily to perform a great amount of professional work. His natural endowments and habits of unceasing labor enabled him to attain high eminence in a learned profession, and this without the aid of that early training in schools and colleges which is now deemed so essential to professional attainment and success. To those gentlemanly characteristics which were his by nature he added, by wide reading and self-culture, a polish which made him very attractive in all business and social relations. By a powerful analysis he reduced complex propositions to their simplest terms. With a logic that was cogent and a power of statement that was almost marvelous, he marshaled the leading facts and legal principles of his case. In argument to court or jury he was strong and persuasive. His loyalty to his client's cause was almost religious in its intensity. To him no case that he advocated was ever weak,—no client wrong. When the court of last resort had decided adversely his motion for rehearing, he still clung to his convictions. While he bowed to the mandate of the court, he reluctantly yielded to

its conclusion. He was exceptional among his professional brethren in the possession of a business thrift and enterprise that enabled him to acquire a substantial competence. It is no flattery to say in this presence that he was a great lawyer. His absence will be seriously felt in the courts and in professional circles, and his clients will feel the loss of his advice. The domestic relations of Mr. FISH were most felicitous, and his death will prove a sore affliction to the surviving members of his family.

We therefore tender to the stricken family, whose greater loss and profound affliction we can appreciate when measured by our own, our heartfelt sympathy, and direct that the secretary of this association cause a copy of this memorial to be presented to them.

Judge Dyer then said:

If your Honors please:—It has been aptly said that there is always room for a man of force; and that the best heads take the best places. A feeble man, says Emerson, can see the farms that are fenced and tilled, the houses that are built. The strong man sees the *possible* houses and farms. His eye makes estates as fast as the sun breeds clouds. The verity of these observations our friend made plain from the beginning to the close of the strenuous life he lived. He began humbly, he proceeded diligently, and he accomplished signally what he set out to achieve. He needed a house, and so, with characteristic energy, he built a house with his own hands. He looked upon a well-tilled farm and he said "I will have a better one," and he possessed it. In the dullness of rural life he looked into some law books, and he said "I will be a lawyer," and he made of himself one of the first lawyers in the state. Force, tenacity of purpose, ambition, resolute spirit, all combined with sturdy intellect, carried him to the best place. It is the old story of the empty-handed, untutored rustic, whose sole inheritance—the best the world affords—is brains and courage, ripening into the strength and symmetry of a splendid manhood, finally courting rivalry, exciting emulation, and happy in the enjoyments of professional eminence.

When Erskine found at the door of his lonely chambers a slip of paper on which was written "King's Bench. The King vs. Baillie. Retainer for the Defendant, The Honorable Thomas Erskine, One Guinea;" and when the "yellow golden guinea" was actually put into his hand, it is said that he exclaimed "The day will come when the Star of the Thistle shall blaze on my garter." A dream of fame, of fortune, of the woolsack! So did our friend when he was obscurely riding the circuit, where justices of the peace beneficently dispensed the blessings of their jurisdiction, dream of a time when he should argue causes where courts sit in final judgment, and when he should enrol his name among the masters of the profession.

I knew him as a lawyer, comrade, and friend for over thirty years, and now that he lies mute in "that realm of silence where the innumerable dwell," friendship bids me testify to his fidelity to principles of human conduct, which, like milestones along the roadway, fix the courses of a manly and useful life. I think I have never known a man who faced responsibilities more seriously and strenuously. The law possessed him and he was a willing slave. He was not merely zealous, but eager in its pursuit. He challenged to forensic combat any contestant who came in his way. Once I told him, in admiration of his zeal, that if his advocacy of a cause defied the law of gravitation his confidence would continue unabated, and he thought, himself, that might be so. He stood by his colors as vigorously after as before adverse judgment. Moreover, it was seldom safe to dispute his judgment of the law. His habit was to apply to his case elementary principles, reach his conclusion, and then, if need be, search for authorities to support that conclusion. If he found some solitary authority against him, he treated it as an estray and put it aside, perhaps with contemptuous comment. With him, persistence was a virtue. If his adversary struck him at a vital point, he rallied promptly and stood his ground. He was aggressive, resolute, self-contained. He grasped the point of his case and threw aside the chaff that incumbered it. He signally illustrated the distinction attainable by force of personal exertion combined with inherited intellectual power, and without adventitious aid. Self-educated, but gifted with rare natural endowments, rigorous in habit of self-discipline and self-reliance, zealous in pursuit of professional aims, he worked his way to recognized leadership among his ablest cotemporaries. He became learned in many branches of the law, but, I think, his favorite topics of legal study were corporation law and equity. He argued two hundred and thirty-six causes in this court, and his name appears as counsel in every volume of the Reports from and including Volume 29 to and including Volume 105 with nine exceptions—covering the period from 1872 to 1900. If conclusive testimony were needed in proof of the industry, thoroughness, and research that characterized every brief he ever presented at this bar, I would appeal to the justices of this court in succession, if all were living, who for twenty-eight years have sat upon the bench now occupied by your Honors, and doubt not the unanimity of their judgment.

His first case was *Ela v. American Merchants' Union Express Company*, reported in Volume 29, involving the rights and duties of consignor, carrier, and consignee, and in which it was held that privity of contract between parties is not necessary to sustain an action for money had and received; it is sufficient that the defendant has money which of right belongs to another and which it is against conscience for him to keep.

Another of his later cases was *Driver v. Western Union Railroad Company*, reported in Volume 82, where, much to my own discomfiture, the judgment of the court in a proceeding to condemn property for railroad purposes was, that evidence of the business to which the owner's adjoining land was devoted and of the effect upon such business of the taking of the particular land actually appropriated was properly admitted, as bearing upon the question of damages—an opinion in which Chief Justice DIXON concurred and which entangled him in embarrassments and tried his temper in contests involving the question, in which he became engaged after his return to the bar.

In the results of two most important causes which Mr. FISH argued in this court he felt special and just pride—the first, *In re The Taylor Orphan Asylum*, reported in Volume 36, in which the court condemned the purchase of trust property by fiduciaries and held them liable for the profits realized—the second, *Gould, Administrator, v. The Taylor Orphan Asylum*, reported in Volume 46, in which it was held that donees in trust under a will took power to administer the trust until a corporation contemplated by the will should be created, and that equity never suffers a trust to expire with the trustee. It was in this case that Mr. Justice COLE gave utterance in his opinion to this fine sentiment:

"It affords the court much gratification to be able, without violation of statute or principle, to sustain the will and the charity created under it. In the present state of the law here, there is the same right to be charitable after death as during life. It would be sad enough to see this noble charity strangled in the house of its friends and the orphans cherished by it, almost as a mother cherishes her little ones, turned adrift in the bleak world, to satisfy the greed of collateral next of kin, many or all of them already enjoying the bounty of the testatrix under the very will providing for the charity. It would be a reproach to the administration of justice, if the consecration of so fine a fortune to so holy a charity should fail on grounds purely technical."

Wells v. American Express Company, reported in Volumes 44, 49 and 55 of the Reports, illustrated the persistence of our friend. The case was three times in this court. It was contested by able counsel, and in the first instance the judgment for the plaintiff in the court below was reversed. But the plaintiff's counsel was a man who never gave up so long as there was a gleam of legal principle in his favor, and finally the judgment he recovered on new trial was affirmed.

Emerson v. Durand, reported in Volume 64, was a case to which our friend loved to recur. He had stoutly advocated a principle which seemed rather a departure from recognized authority. In support of his contention, the court held that a partner may claim compensation for his services in connection with the partnership business, if an agreement is *fairly implied* from the course of dealing between the partners, or from *circumstances of equivalent force*.

In *Wells v. McGeoch*, reported in Volume 71, he made probably his crowning effort, and I have heard it said that his argument in that case, in unraveling the facts and in presentation of the law, was an effort rarely surpassed.

In the popular sense, Mr. FISH was not an eloquent advocate. He affected none of the graces of rhetoric. His arguments were not embellished by the scholastic use of words. He never loitered for ornament. But few excelled him in strength and persuasiveness before either court or jury. He was singularly strong in applying the law to the facts. He possessed exceptional power of analysis and vigor of perspicuous statement. It was said of Benjamin Curtis that his statement of a case made argument superfluous. Our friend studied Curtis as a model to copy, and in his last days when he realized that the summer was past, the harvest ended, he lingered with delight over the judgments of Chief Justice MARSHALL. It may be said of him without excess of encomium that in all respects he was a strong lawyer, in many respects a great lawyer. Of high character, of integrity without blemish, he commanded public respect and personal regard. In companionship he was genial, and in conversational discussion of legal or literary topics he was pleasing and instructive. In stature, expression, and bearing Mr. FISH was an attractive personality. His home was such as is described in the observations of an ancient writer: "No picture can give greater delight to the mind than one where domestic happiness is drawn in full beauty; where friendship, cheerfulness, and all the social virtues appear in their just attitude; where plenty and economy are joined hand in hand; and where generosity sits smiling at her own gifts." He felt just pride in a family as honorable as he, in character and position.

Stricken in his closing days with the deepest sorrow that can touch the heart, when the shadows of the evening twilight deepened about his hearthstone, amid tumultuous emotions, he reverted to the felicities of the past, and then he composedly summed up the ambitions and struggles of human life at their true worth.

Not again shall this court welcome to its presence the lawyer and friend whose virtues we commemorate. His death awakens with peculiar force reflections of that hour when the hope and faith innate in the human heart shall assert their supremacy over human reason — that hour when "the individual life, a cloud, a vapor, passeth away." It enforces the truth of universal experience that in this battle of life sorrows must come, since none whether young, middle-aged, or old can escape the destiny fixed by the immutable law of nature. Sons must take the places of their fathers; daughters with holy reverence must walk in the footsteps of mothers; brothers must take up the burden

where brother laid it down. And so there is ever pressing need for "hearts of oak" and hands of sturdy grasp to do the world's work which forever remaineth to be done. It is an admonition that for many of us, too, the sun deepens in its glow and quickens its course down the evening sky. To him, not long ago, there was a tinge of luster on the verge of the hills which yet seemed distant, and the dawn was abroad in all the freshness of a summer morning. But the brightness of morning was but the forerunner of the dusk of evening.

If your Honors please, I move that the memorial of the bar be spread upon the records of this court.

Mr. Edward M. Hyzer of Milwaukee then spoke:

May it please the Court:—After the expressive words already spoken, the memory of Mr. FISH and our appreciation of his character need no further proof, but that affection which the goodness of his heart made it most easy for him to create grasps an opportunity like this for outward expression. Having enjoyed an intimate association with him, having been warmed by the sunshine of his presence, having been strengthened by his strength, having *known the man*, I beg to be allowed to speak of him.

We are not standing in the presence of a grave. We are standing in the presence of *a life*, and in the presence of this life it is proper that we should stop, reflect, and uncover our heads. Not because there has been no other life like it, but rather because such a life meant so much to him and should mean so much to us.

The earthly career of our brother is completed, and were it not for one thought contemplation of it would call for tears.

True, viewing it from the standpoint of human desires, measuring it by the standard of worldly success, applause may be considered its due.

But what of it *now?* We must view it *now* from some other standpoint, we must have for it some other criterion, or we must admit its effort is now fruitless.

In thinking of his life we unconsciously look for the compensation,—compensation to him, and possibly compensation to ourselves if we try to emulate it.

Wherein shall we find it? His life was one of constant, ceaseless, never-ending toil; toil that led from the farm to the village, to the city, to the metropolis; from the capacity to manage unimportant matters to the conduct of vast affairs; from poverty to wealth; from the inferior courts to the highest tribunals of the world; toil that led from nothing to success, from the darkness of the valley to the glory of the summit.

I am not speaking in the language of eulogy. I am not dwelling upon earthly success.

I am rather expressing the sadness which fills me when I think of

such a life: when I think of the days of labor, the nights "devoid of ease," the self-imposed discipline, the crucifixion of the flesh, the dripping of mental sweat, the agony of mental effort, the "constant anguish of patience," — I am rather thinking of these things and looking for the compensation.

This thought was voiced in the cry,

"Why should we toil alone,
We only toil, who are the first of things,
And make perpetual moan,
Still from one sorrow to another thrown;
Nor ever fold our wings,
And cease from wanderings,
Nor steep our brows in slumber's holy balm;
Nor hearken what the inner spirit sings,
'There is no joy but calm!'
Why should we only toil, the roof and crown of things?"

But the answer comes, I think, with the conviction that unless we are the sport, the intelligent toys of unintelligent and accidental forces, such a career is a fulfillment of the Divine plan, which, though inscrutable, seems to lead upward through suffering.

It is the beginning, it is the threshold of life, it is the cultivation of a human heart, it is the development of a human intelligence, it is the evolution of a human soul.

This career which we are contemplating has worn away the flesh and has enabled our brother to "*put on*" immortality. He has joined the throng of those whose lives have been like his.

In the presence of this life, in the presence of this earthly sacrifice, in the presence of this accomplished salvation, it is meet that we should stand uncovered, aided and comforted by the thought that compensation is full and complete.

Mr. Justice DODGE, on behalf of the court, responded:

During the last thirty years of the history of this court, in which period the crystallization of its labors has filled nearly three quarters of the entire number of its published Reports, among the Titans of the bar whose thought and logic have served to aid and guide the court in its efforts to establish a stable, sound, and practical system of law, few men have stood forth more sturdy, forceful, or influential than JOHN T. FISH. From the twenty-ninth volume of those Reports to the one hundred and seventh is spread the imprint of his vigorous mentality and advocacy, and his name appears of counsel upon the record of many of those great cases which are landmarks in the development of our jurisprudence,— those cases which serve to settle important and fundamental principles of law in their application to concrete instances, and from which the lawyer and the court start as from firm ground to think their way to new rules and new applications, adapted to other compli-

cations of circumstances which human ingenuity, enterprise, or greed are continually presenting. His service to this court was unconscious, almost unintentional. His motives were those of the advocate, not the philosopher,—first to find a sound underlying principle of the law, from which he could deduce rules which would protect the right of his client; then, by that force and that logic so peculiarly his, to convince the court of the soundness of the principle and the correctness of his deductions. Amongst the forces that are effective and useful to courts, none is greater than sincere and able professional partisanship. As the antagonistic centripetal and centrifugal forces serve to keep the spheres in their orderly orbits, so the conflicting contentions of able and ardent advocates serve to guide courts along the true path of law and justice.

In this field of usefulness Mr. FISH was eminent. Were the defeat of his client attempted by a plausible and attractive fallacy, fraught with danger in its ultimate extension, there was never peril that such danger would not be brought vividly before the court by him, or such fallacy be stript of its plausibility. If the court decided against him, it must do so only after full consideration of all countervailing arguments and with full warning of any peril to our jurisprudence. Such service to the cause of right and justice, though it be rendered only incidentally to the performance of private duty, promotes the cause of abstract justice. To quote an eloquent period from Webster:

"Justice, Sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name, and fame, and character, with that which is and must be as durable as the frame of human society."

High among those who have thus served their fellowmen must ever stand the memory of Mr. FISH.

It is not for me to recite in detail that history nor those qualities commemorated in the earnest memorial now tendered by his brethren of the bar and so touchingly and eloquently voiced by his old-time friend and collaborator who is the bearer of that memorial. Nor may I, commissioned to speak only for the court, attempt to express my personal obligation and affection, the growth of many years of personal and professional intimacy, nor my sense of bereavement now that he is no more. I may, however, recognize and declare that in the course of the strenuous and unswerving performance of his duties to his clients he won to himself, not only from the members of this court, but from his antagonists at the bar, respect for his fidelity and sincerity, admiration for his ability and force, and withal warm personal regard.

CASES DETERMINED

AT THE

August Term, 1900.

HOLDRIDGE, Respondent, vs. MENDENHALL, Receiver, Appellant. | 108 1 | 110 *421

September 28 — October 30, 1900.

Street railways: Negligence: Injury to child in street: Contributory negligence of child and of parents: Court and jury: Proximate cause: Speed of car: Loss of services: Evidence.

1. In an action to recover for loss of the services of a boy less than seven years old who was run over and injured by a street car, the questions whether the boy was guilty of contributory negligence and whether his parents were negligent in permitting him to be alone upon the street are *held*, upon the evidence, to have been for the jury.
2. The excessive and negligent speed of a street car cannot be said to have been the proximate cause of the injury to a boy who unexpectedly ran in front of the car, if the motorman had no reason to expect any such action on his part and the accident would have happened in the same way had the car been going at a normal and reasonable speed.
3. The evidence in this case is *held* to show that the boy unexpectedly stepped or ran in front of the car when it was only a few feet distant, and, there being no reason to say that the motorman could have anticipated such action, his failure to anticipate it cannot be called negligence.
4. In an action by a parent to recover for loss of the services of a minor child, evidence as to the parent's pecuniary condition, the amount of his property, his earnings, and the size of his family, is inadmissible.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Reversed.*

This is an action by a father to recover for the loss of services of his minor son. The evidence upon the trial showed that in June, 1900, the defendant, as receiver of the Duluth Street Railway Company, was operating street cars upon street-railway tracks in the city of Superior, Wisconsin; that the plaintiff's son Rex, a boy about six years nine months of age, was struck by one of the defendant's street-railway cars on the 23d of June, 1900, and run over by the car, receiving serious injuries. The accident happened upon Tower avenue, which street runs directly north and south and is the principal business street in the city of Superior, at a point about 150 feet south of the intersection of Tower avenue with an east and west street called Belknap street. Tower avenue is a street 100 feet in width, and there are two street-railway tracks in the center of the street. The car in question had stopped previous to the accident for the purpose of letting off passengers at the south side of Belknap street. It then proceeded south for about 150 feet, at which point the accident happened. The time of the accident was about 6 o'clock p. m., and it was still daylight. It appears from the evidence that the boy Rex, with some other boys, was on the west sidewalk of Tower avenue, when one of the other boys threw three peanuts into the street, saying, "Come on, kids; I'll throw out some peanuts." One of the peanuts went only a few feet into the street, another went onto the street-railway tracks, and the third went nearly to the east side of the roadway of the street. Rex and two other boys started for the peanuts. One of the other boys got the nearest peanut, and Rex, seeing that he could not get that one, started for the second, and got it, and was about to go for the third one, when he was struck by the defendant's car, which he had not seen. He was carried along a little distance on the fender of the car, but

rolled off the fender under the car, which passed over him and inflicted injuries. The claim of the plaintiff is that the boy had been standing upon the track, eating the peanut, for some seconds, and that the motorman was guilty of negligence in not seeing him and stopping the car or giving warning. On the other hand, the claim of the defendant is that the boy darted immediately in front of the car, so that it could not be stopped, or any warning given.

There was a general verdict for the plaintiff, assessing his damages at $1,160, of which $800 was compensation for future services. The jury also answered a special question which was submitted to them by the court to the effect that the boy was not guilty of any want of ordinary care which contributed to cause the accident. Upon a motion for a new trial the court held that the verdict of $800 for future services was excessive, and granted a new trial unless the plaintiff remitted $500 from the verdict. This remission was made, and judgment entered for the balance of the verdict, and the defendant appeals.

For the appellant there was a brief by *Ross, Dwyer & Hile*, and oral argument by *W. D. Dwyer*. They argued, among other things, that there was no negligence of the motorman proximately causing the injury. *Greenberg v. Third Ave. R. Co.* 35 App. Div. 619; *Pletcher v. Scranton T. Co.* 185 Pa. St. 147; *Funk v. Electric T. Co.* 175 Pa. St. 559. The boy was guilty of negligence precluding a recovery. *Ewen v. C. & N. W. R. Co.* 38 Wis. 613, 628; *Strong v. Stevens Point*, 62 Wis. 255, 264; *Morey v. Gloucester St. R. Co.* 171 Mass. 164; *Weiss v. Metropolitan St. R. Co.* 53 N. Y. Supp. 449; *Wendell v. N. Y. C. & H. R. R. Co.* 91 N. Y. 421, 425; *O'Rourke v. New Orleans City & L. R. Co.* 51 La. Ann. 755; *Dull v. C., C., C. & St. L. R. Co.* 21 Ind. App. 571.

For the respondent there was a brief by *Heber McHugh* and *W. P. Crawford*, and oral argument by *Mr. McHugh*.

WINSLOW, J. The boy who was run over by the defendant's street car in this case was a little less than seven years of age, and was upon the public street, in the daytime, alone, or at least not accompanied by either his parents or any custodian. It is argued that the trial court should have taken the case from the jury, and granted a nonsuit, on the ground of contributory negligence on the part of the boy or his parents. This contention cannot be sustained. In case of an accident happening to a child of such tender years, it must be an extreme case indeed which would warrant a court in granting a nonsuit on the ground of the child's negligence; and it is frequently said that such a child cannot be held guilty of contributory negligence as a matter of law. *Johnson v. C. & N. W. R. Co.* 49 Wis. 529; *McVoy v. Oakes*, 91 Wis. 214. Nor can it be said that the parents are guilty of negligence as matter of law for permitting such a child to be alone upon the street. Both of these questions were properly for the jury upon the evidence. *Johnson v. C. & N. W. R. Co., supra.*

But the question whether the evidence showed any negligence on the part of the motorman which was the proximate cause of the injury is a more difficult one. The negligence claimed is that the car was running at excessive speed, that no signals were given, and thus that the boy was run down when the evidence tended to show that he had been on the track a sufficient time within which signals could have been given or the car stopped before reaching him. There is no dispute but that the accident happened in the middle of a block, at a place where people were not expected to cross the street; and it is admitted that the street car, at the time of the accident, had only proceeded about 150 feet from a full stop. One of the plaintiff's witnesses testifies that in his judgment the car was going at the rate of twenty-five miles an hour when it was still about sixty feet from the boy, or at a point about ninety feet from the starting point.

There is no other testimony, however, which corroborates this estimate, and the testimony of the remaining witnesses on the subject is that the speed did not exceed six or eight miles an hour. The inherent improbability, and almost impossibility, of attaining such a speed in such a short distance is patent, and is supplemented by considerable testimony of experts that it would be absolutely impossible with the motor in use upon the car to attain a speed of twenty-five miles an hour within that distance, or within any distance less than two or three blocks. Assuming, however, that there was sufficient testimony to go to the jury upon the subject of excessive and negligent speed, it is very evident that, unless such negligent speed was the proximate cause of the injury, there can be no recovery on this ground. *Pletcher v. Scranton T. Co.* 185 Pa. St. 147. If the boy ran unexpectedly in front of the car, and the motorman had no reason to expect any such action on his part, and the accident would have happened in the same way had the car been going at a normal and reasonable speed, then it cannot be said that the speed was the proximate cause of the injury. The accident, in that event, was caused by the sudden and unexpected movement of the boy, and not by the negligence of the motorman. *Funk v. Electric Traction Co.* 175 Pa. St. 559.

Careful examination of all of the evidence of the eyewitnesses of the accident, including that of the boy himself, convinces us that it was practically undisputed in the case that the boy unexpectedly stepped or ran in front of the car when only a few feet distant, and when it could not have been stopped, nor effective warning given, before it ran over him, whatever its speed. It is true that the boy himself testified that he ran into the middle of the track, and got the peanut, and was standing still, eating it, and had been so standing for a few minutes when he was struck by the car; but this evidence is not only impossible under the admitted facts, but is at variance with the testimony of all

the other witnesses who saw the accident, and is also denied by the boy himself. During his cross-examination he said that it took him about a second to get the first peanut, which he picked up between or on the tracks; that, if the car had not struck him, it would have been about a second more when he got the other one; that the moment he got the first one he was going to get the other one, and the car struck him while he was in the act of moving; that he knew what a second was; that the clock ticks about once a second, and it took him just about that long to go from the curbstone to the first track, and would have taken him about two seconds to get the other one if the car had not hit him. This was repeated in substance two or three times. The boy who threw the peanuts, who was ten years of age, testified that Rex had gone across the west track, and stood between the tracks; that some boys hollered at him, and he jumped right in front of the car, and it struck him. Dr. Sarazin, who was standing on the sidewalk, and saw the peanuts thrown, and the boys start after them, did not keep his eye upon them, but saw Rex on the track, looking east, when the car was about ten feet from him, and at once shouted to the motorman. A young man eighteen years of age, who saw the accident from the sidewalk on the east side of the street, testified that he heard somebody yell, and looked, and saw the boy jump right in front of the car; that he ran from the east right in front of the car, and was knocked down. The motorman testified that when he started from Belknap street no one was on the track; that he saw some boys playing on the west side of the street about the curbstone; that all of a sudden they scattered, and were grabbing after something; that one chased another, and came to within three or four feet of the track and stopped, and one stooped to pick up something, and then jumped out in the middle of the track in front of the fender; that he (the motorman) was about eight feet from the boy when he

stooped to pick up something, and that he then had thrown off the power and hollered at the boy, and was reaching for the reverse, and in that time the boy jumped in front of the car. The only other witness of the accident who testified was a man who sat on the curbstone at the southwest corner of Tower avenue and Belknap street, who testified that as he sat there he saw three boys start to run across the track; that the street car passed going south very rapidly, and that almost instantly as the car passed he saw two boys cross on the other side of the track; that the third boy was under the car; that he did not see him hit, and did not know which way he was looking, nor how he got struck; that it was all done very quickly,—in a second or two.

As will be seen, there is nothing in all this evidence except the palpably impossible statement of the boy himself, which he afterwards contradicted, which brings the boy upon the track more than ten feet in front of the car. The conclusion that he stepped or ran in front of the car when only a few feet distant is irresistible; in fact, the evidence will sustain no other. The testimony is unanimous that the car could not be stopped within this distance, whether it was going twenty-five miles an hour or six miles an hour. The most of the witnesses who testify on the subject say that a car going eight miles an hour could not be stopped short of about sixty feet. It is true one witness says that an emergency stop could be made inside of fifteen feet, but he afterwards says that this fifteen feet would be after the power is actually applied on reversal, and that it would take about thirty seconds before the power got hold of the car.

So the case presented is one of the sudden and unexpected action of the boy in running in front of the car. We see no reason to say that the motorman could reasonably anticipate such action on the part of the boy, and hence his failure to anticipate it cannot be called negligence. *Eastwood v. La Crosse City R. Co.* 94 Wis. 163.

A minor error was committed on the trial affecting the measure of damages. The plaintiff was allowed to testify as to his pecuniary condition, the amount of his property, his earnings, and the size of his family. This was error in an action for loss of services, under the ruling of this court in the case of *Rooney v. Milwaukee C. Co.* 65 Wis. 397.

By the Court.—Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J., took no part.

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THE STATE EX REL. ATKINSON, Respondent, vs. McDONALD, Appellant.

October 12—October 30, 1900.

Title to office: Trial by jury: Eligibility: Residence: Evidence: Naturalization proceedings: Admissions: Res adjudicata.

On November 18, 1898, appellant became a citizen of the United States by the judgment of a district court of the state of Minnesota rendered on evidence as to his residence in that state to the effect that he had resided there continuously for the year immediately preceding his application; and in September, 1899, pursuant to an appointment to the office of lumber inspector of the Thirteenth district of Wisconsin, then held by the relator, he formally qualified therefor, and thereupon demanded possession of the books and papers of the office, which demand was complied with, the relator supposing appellant to be eligible to the office. Thereafter the relator was informed that appellant was not an elector of the state of Wisconsin, and thereupon he commenced this action to regain possession of the office upon the ground that he was entitled thereto till a person should be appointed and should qualify who was eligible to the position. The cause was tried by the court with a jury. The record of the proceedings of the Minnesota court was received in evidence against a general objection, and was held conclusive upon appellant on the question of his eligibility to the office. *Held:*

1. Proceedings to try the title to an office constitute a civil action in which controverted questions of fact are triable by a jury as a matter of right.

2. The record of the naturalization proceedings was properly received in evidence, (a) as an admission against interest, (b) as a former adjudication as to a material fact, hence binding upon the appellant.

3. The naturalization proceedings were in effect an action *in rem* and the result binding upon the world not only as to the ultimate fact established but the facts upon which such result was based.

4. It appearing conclusively that the adjudication of citizenship by the Minnesota court, as to residence in the state of Minnesota, was based wholly on proof of a year's residence there immediately preceding the making of the application for citizenship, the truth thereof was vital to the conclusion reached, and the decision on that point necessarily became a part of the judgment and is as binding upon appellant as the judgment itself, regardless of whether the federal statute calls for the particular year's residence covered by the proof or not.

5. The conclusiveness of the judgment of the Minnesota court is ruled by the doctrine regarding judgments *in rem* and the rule that the *res adjudicata*, as to a final judicial determination, extends to every proposition assumed or decided by the court upon which the final conclusion is based.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

Action to try the title to the office of lumber inspector for the Thirteenth district of the state of Wisconsin. The complaint is to the following effect: The relator was appointed lumber inspector for said district in April, 1897. He immediately qualified for the position according to law, entered upon the performance of its duties, and thereafter continued in such performance till interrupted by the circumstances hereafter stated. In September, 1899, defendant was appointed relator's successor, and, having gone through with the form of qualifying for the office, demanded the books and papers appertaining thereto, whereupon the relator surrendered the same, supposing defendant was eligible for the

position. Thereafter the relator learned, as the fact was, that defendant was not an elector of the state of Wisconsin when he received his appointment and took possession of the office, but was an elector of the state of Minnesota. Thereupon the relator demanded of defendant a surrender of the possession of the office and of the books and papers belonging thereto, which demand was refused.

Defendant answered, joining issue with the allegations to the effect that he was not eligible to the office of lumber inspector.

The cause was tried before a jury. Plaintiff introduced in evidence a duly authenticated record of proceedings in the district court for the Eleventh judicial district of the state of Minnesota, had November 18, 1898, admitting defendant to United States citizenship. Such record is to the effect that defendant applied for admission to United States citizenship, and that the application was granted on his affidavit, corroborated by the affidavits of two other persons, that for five years prior to the application defendant had resided in the United States, and that, during the year immediately preceding such application, he had resided continuously in the state of Minnesota.

Defendant testified, in substance, that he came to the United States to reside permanently when he was about twenty-one years of age; that he resided first in Michigan, then in Minnesota, then in Wisconsin; that he was a deputy under the surveyor general for the Fifth district of Minnesota in the winter of 1897–98, and voted in Minnesota once while a resident there; that he came to the city of Superior in the early part of 1898 and made his home at the Northern Hotel; that all of his personal belongings were kept there and that it was his home till shortly after the commencement of this action, when he removed to the Wemyss Block in said city; that he was away from Superior occasionally, including a two-months visit in the East, but that his home remained as

stated; that his absences were temporary and with the intention of returning; that he was an unmarried man; that he came to Superior and remained as stated, with the intention of making that his home, and that such intention has not changed; that he did not read the affidavits used on his application for citizenship, did not know what they contained, and that they were not true; that he made his declaration of intention to become a citizen of the United States in 1893; that he voted at the state election in 1898 and at the preceding municipal election; that his intention has been, at all times since the spring of 1898, to reside in Wisconsin. On the subject of actual residence in Wisconsin defendant was corroborated by several witnesses.

At the close of the evidence both sides moved the court for the direction of a verdict. Plaintiff's motion was granted and defendant duly excepted. Thereafter defendant moved the court to set aside the verdict and grant a new trial, which was denied, due exception being taken to the ruling. Judgment was rendered against defendant, and he appealed.

For the appellant there was a brief by *Ross, Dwyer & Hile*, and oral argument by *W. D. Dwyer*.

Victor Linley, for the respondent.

MARSHALL, J. It is evident that the verdict was directed in plaintiff's favor either on the theory that the record of defendant's application for citizenship was conclusive against him as to his place of residence during the time covered by such record, or that the verdict of the jury, in any event, would be only advisory to the court. Both theories are contended for in support of the judgment.

This is a civil action under sec. 3463, Stats. 1898, and governed thereby and by the established principles respecting such actions. We need not discuss the question of whether, in *quo warranto* proceedings at common law, contested questions of fact were triable by a jury as a matter

of right, or whether the authorities are uniform as regards such being a matter of right under the reformed procedure in Code states where there is no express constitutional or statutory regulation of the subject. There is some conflict of decisions in regard to the matter. 17 Ency. of Pl. & Pr. 479. It is said that it appears to be the general practice to submit all issues of fact, in informations in the nature of *quo warranto*, to a jury, and to proceed in the trial of such actions according to the course of the common law. In states where a civil action has been substituted for the common-law proceeding to try title to an office, it is deemed to be a legal action and within the constitutional guaranty of the right to trial by jury. In *People ex rel. White v. Doesburg*, 16 Mich. 133, it is said that the court has no right to deprive a party of his right to trial by jury where there is an issue of fact in *quo warranto*. In *People v. A. & S. R. Co.* 57 N. Y. 161, the subject received careful consideration, and it was held that an action in the nature of *quo warranto* is one of strict legal cognizance and hence that the parties have a constitutional right to have all issues of fact tried by a jury. The right of trial by jury is clearly recognized by our statutes. Sec. 3464 provides that, "Actions of *quo warranto* and *scire facias* shall be tried at special as well as at general terms of the circuit court, and the court shall have the power to summon a jury for the purpose and prescribe the manner of summoning the same." It is evident that the clause in regard to summoning a jury was added to the statute because of a preceding clause in regard to the trial of such actions at special terms where the statutes do not provide generally for the summoning of jurors. In an action of this kind commenced here, it has been clearly indicated that the right of trial by jury is absolute, and that the action should not be delayed because of the necessity for a jury trial of the issue of fact, by sending the cause to a circuit court, but that a jury should be called in this court. *State ex rel. Att'y Gen. v. Messmore*, 14 Wis. 115.

There is little room for controversy on the subject of whether issues of fact in actions of *quo warranto* are triable as a matter of right by a jury. They are clearly legal actions under the Code, to be tried the same as any other such action, except, on account of the importance of a speedy determination of the controversy, they are triable at a special as well as at general terms, and jurors may be summoned for that purpose when necessary.

The record of the proceedings in the Minnesota court was admissible in evidence, first, upon the general principle that self-disserving admissions may be shown against the party making them, where the subject thereof is in controversy; second, by the rule that a judgment is binding upon parties and privies as to the final result pronounced and the facts established or assumed upon which it is based.

If the evidence were admissible only on the first ground stated, the court was not justified in taking the case from the jury, but if it was admissible on the second ground — and we hold that it was — the evidence was conclusive of the fact in issue, and the direction of the verdict was proper.

There are many cases where persons do not appear of record by name and cannot be heard directly in the action, yet are deemed parties by representation and are bound by the judgment as effectually as those who stand in court to represent them. In such cases all such parties are deemed to be in privity with those who actually appear of record. A judgment against a corporation is conclusive against its stockholders in an action to enforce their statutory liability to creditors. A person suing as a taxpayer, in behalf of himself and all persons similarly situated, stands for all such taxpayers, so that a judgment rendered in the action is binding on every taxpayer in the municipality. A judgment against a municipality is binding on all its taxpayers in a proceeding to collect a tax to satisfy the judgment. Each taxpayer is considered as a participant in the litiga-

tion closed by the judgment, so that he can neither impeach the judgment collaterally nor relitigate any of the questions decided upon which the judgment was based. *Clark v. Wolf*, 29 Iowa, 197; *State ex rel. Wilson v. Rainey*, 74 Mo. 229; *Harmon v. Auditor of Public Accounts*, 123 Ill. 122. A judgment against a trustee is binding on his *cestui que trust.* So is an adjudication by a county court, as to a guardian's or administrator's account, binding on all interested, including the bondsmen. A judgment declaring a person insane and placing him under guardianship is conclusive as to such person's mental status and competency to do business. Many more examples might be given. Such actions are regarded as actions *in rem.* While a judgment in an action *in personam* is binding only on the parties of record and those claiming under them, a judgment *in rem* renders the subject on which it operates "what it declares it to be" and is consequently binding upon the world. Every person is supposed to be concerned in such an adjudication and to be constructively before the court. Such actions, of course, should not be confused with those which concern property, yet only involve personal rights in regard thereto — rights in which the public generally are not interested — such as actions to enforce liens and to reach property by attachment and subject it to payment of the plaintiff's claim. Many examples might be given where the *res* involved, which classified the action as one *in rem*, was the legal status of the person, as, for example, the legal settlement as regards right of public support. *Cabot v. Washington*, 41 Vt. 168. The condition as regards whether married or single. *Hood v. Hood*, 110 Mass. 463; *Smith v. Smith*, 13 Gray, 209; *Pennoyer v. Neff*, 95 U. S. 714.

The rule of *res adjudicata* is as broad, where status is the subject upon which the judgment acts, in that it is binding on the whole world, as it is *inter partes* where mere personal rights are the subject of the litigation. That is well illus-

trated in *Pittsford v. Chittenden*, 58 Vt. 49, where it was held that a judgment determining the settlement of an illegitimate child was conclusive in a subsequent action involving the settlement of the mother, because that was an essential fact in the first proceeding. 'Whatever has been necessarily decided,' said the court in substance, 'in reaching the final result, must stand unimpeached. The controlling facts upon which the former adjudication was rested, though not directly in issue, cannot be reviewed collaterally. They are to be deemed material to the judgment and conclusively settled by it.'

Judgments of naturalization are governed by the same rules. They fix the status of the naturalized person irrevocably, and necessarily include all the facts upon which they are based. Black, Judgments, § 804; *State ex rel. Kickbush v. Hœflinger*, 35 Wis. 393; *Spratt v. Spratt*, 4 Pet. 393; *McCarthy v. Marsh*, 5 N. Y. 263. In such a proceeding every person is regarded as a party actually or constructively. It is no answer to the rule as applied to this case to say that the judgment naturalizing appellant is not conclusive as to his having resided in the state of Minnesota for the year preceding his application, because that particular year's residence was not essential to the judgment; that any year within the five years of residence required within the United States is sufficient. Whether the suggestion that the one year's residence within the state is not required to be the year immediately preceding the application for citizenship is a correct construction of the federal statute, need not be decided in this case. It is sufficient that the record shows that the court pronounced judgment upon evidence establishing one year's residence within the state of Minnesota immediately preceding the application. The truth of that evidence was the turning point in passing upon appellant's application. It was therefore material regardless of whether the particular year's residence covered by the proof was es-

sential or not. The point falls squarely within the rule that every proposition assumed or decided by the court leading up to the final conclusion and upon which such conclusion is based, is as effectually passed upon as the ultimate question which is finally solved. *Brown v. C. & N. W. R. Co.* 102 Wis. 137; *State v. National A. Soc.* 103 Wis. 208; *School Trustees v. Stocker*, 42 N. J. Law, 115.

It follows that the ruling of the trial court, that the Minnesota court, in the application for citizenship, adjudged that the applicant was a resident of that state on November 18, 1898, and that such judgment is conclusive of the same question in this action, is correct. That being the case, obviously appellant was not eligible to the office of lumber inspector when he received the appointment thereto or when he entered upon the duties thereof, and respondent was entitled to hold the office when this action was commenced and when it went to judgment. The verdict was properly directed.

By the Court.— The judgment is affirmed.

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THE STATE EX REL. TAYLOR, Appellant, vs. THE CITY OF SUPERIOR and another, Respondents.

October 12 — October 30, 1900.

Municipal corporations: Streets: Change of grade: Determining damages: Laches of owner: Mandamus.

1. Sec. 113 of the city charter of Superior (ch. 124, Laws of 1891) authorizes the board of public works to change the established grade of any street, but provides that the owner of abutting property may recover his damages in the manner set forth in the charter. Sec. 119 provides that *before* any established grade shall be changed the board shall determine the damages and benefits which will accrue to each parcel of real estate. Proceedings for the construction of a viaduct changing the established grade in front of the relator's

premises were instituted in July, 1899, and the work was done shortly thereafter, without any action being taken to determine his damage. He was fully cognizant of what was being done, but made no protest and no demand to have the damages determined until in March, 1900, several months after the viaduct had been completed and opened for travel. *Held* that, because of his laches, it was proper to refuse to compel the city authorities by *mandamus* to proceed to determine the damages.

2. The right to damages in such case being entirely statutory, and the charter providing a way in which they shall be ascertained, *quære* whether such remedy is not exclusive.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

The relator filed his petition for an alternative writ of *mandamus* against the city of *Superior* and its board of public works, from which we glean the following:

Relator is the owner of certain real estate in said city, on the corner of Elmira avenue and North Twenty First street. The grade of such last-named street had been permanently established in August, 1889, by the proper city authorities, and in the year 1892 it was graded and paved in front of his lots according to the grade so established. In the summer of 1899 the council of the city changed such grade, and authorized the construction of a viaduct in front of his lots, without having taken any proceeding to determine the damage to such property by reason thereof, against his consent, and without paying any compensation therefor. By reason of such change, access to the buildings on said lot is almost impossible, and the property has become greatly damaged. In March, 1900, relator demanded that the board and city council should proceed to ascertain such damage as prescribed by the charter, which demand was refused.

On June 25, 1900, an alternative writ was issued. To this the defendants made return, admitting the material facts stated in the petition, and stating that the approaches to said viaduct were built by authority of the common council; that

bids were advertised for on July 25, 1899, and shortly thereafter the job was let and the work done according to the new grade, but that no part of the cost was to be charged to adjoining property, but was to be paid for out of the general fund of the city. The return further sets out that the relator had knowledge that said viaduct and the approach thereto were to be built, and were built, without any determination of the benefits and damages having been made, and that he made no protest or request to the board of public works to act until after the work had been wholly completed and the street opened for travel. It is also alleged that he had an adequate remedy at law, if such change of grade was unlawfully made.

The relator demurred to the return as not stating facts sufficient to justify a disobedience of the alternative writ. The demurrer was overruled, and judgment dismissing the writ, with costs, was entered. The relator brings this appeal.

For the appellant the cause was submitted on the brief of *J. De La Motte* and *T. M. Thorson.* To the point that *mandamus* was the proper remedy, they cited *McCullough v. Brooklyn*, 23 Wend. 458; *State ex rel. Van Vliet v. Wilson*, 17 Wis. 694; *State ex rel. Ahrens v. Fiedler*, 43 N. J. Law, 400; *Kraft v. Madison*, 98 Wis. 256; *Apgar v. School Dist.* 34 N. J. Law, 308; *Sharp v. Mauston*, 92 Wis. 632.

For the respondents there was a brief signed by *Archie McKay* and *Geo. B. Hudnall*, and oral argument by *Mr. McKay.*

Bardeen, J. Sec. 113, ch. 124, Laws of 1891, gives the board of public works, subject to review by the common council, authority to establish the grades of all streets of the city of *Superior*, and to change and re-establish the same as it may deem expedient, "provided that whenever it shall change or alter the permanently established grade of any street, any person sustaining damages to his property abut-

ting on such street by such change or alteration of grade shall have a right to recover such damages in the manner set forth in this chapter." This is followed by provisions fixing the duty of the board, and prescribing the manner in which it shall proceed in the case of the alteration of grades, and, among other things, that there shall be a determination of the damages and benefits which will accrue to each parcel of real estate by such change or alteration of grade.

It is admitted that no action has been taken, either by the board or common council, to determine the relator's damage or to comply with the charter provisions. It is assumed by defendants that, because the city decided to pay the expense of such change in grade out of the general fund of the city, no action by the board to determine the damage to abutting lands was necessary; the city relying upon sec. 119 of the charter as justifying that conclusion. Whether this assumption can be sustained is a matter of considerable doubt. The view we have taken of this case renders it unnecessary to decide this question.

It appears from the petition and return that the proceedings leading up to the change in the grade in front of the relator's premises were instituted in July, 1899, and that the contract for doing the work was let very soon thereafter, and the work was wholly completed a long time before the relator raised any protest or made any complaint to the city authorities. It is shown that he was fully cognizant of what was being done, and yet not until March, 1900, several months after the viaduct had been completed and opened for travel, did he make any remonstrance.

In issuing writs of *mandamus* merely in aid of a private right the courts always exercise a sound discretion and either grant or refuse it as the justice of the particular case may seem to require. *State ex rel. Continental Ins. Co. v. Doyle*, 40 Wis. 220. At all times they require those who would avail themselves of the assistance of this writ to be

prompt, vigilant, and diligent in enforcing their rights. Merrill, Mandamus, § 87. Lapse of time, loss of evidence, intervening rights of third parties, the nature of the relief demanded, and the futility of such relief if granted, are all circumstances which the courts will consider in the exercise of this discretion. It is the same principle that is invoked and applied in cases where it is sought to review municipal action by *certiorari*, a very recent and striking instance of which may be found in *State ex rel. Schintgen v. La Crosse*, 101 Wis. 208. In the case at bar the relator delayed over eight months before even entering a protest, and this while the work was going on right before his door. If it be admitted that a determination of benefits and damages is an essential fact and necessary to a recovery of damages by the relator, sec. 119 provides that such determination shall be made *before* any established grade shall be changed. Knowing this to be so, it became the relator's duty to act with promptness and at a time when the relief sought would be efficacious. Under the circumstances, the court was justified in denying relief on the ground of laches.

It is further suggested that the action of the trial court was warranted on the ground that, if the change in grade was unauthorized, the relator had his action for damages. In view of what has already been said, we do not feel called upon to decide this question. The query, however, is suggested whether, the right to damages in such case being entirely statutory, and the charter providing a way in which such damages shall be ascertained, such remedy is not exclusive. See *Dore v. Milwaukee*, 42 Wis. 108. The cases where any departure from this rule has been sanctioned are mostly cases where there has been some mistake or fraud in the assessment. See *Harrison v. Milwaukee*, 49 Wis. 247; *Kersten v. Milwaukee*, 106 Wis. 200.

By the Court.—The judgment of the superior court of Douglas county is affirmed.

TWOHY MERCANTILE COMPANY, Respondent, vs. ESTATE OF McDONALD and another, Appellants.

October 12 — October 30, 1900

(1, 2) *Payment: Receipt: Contradiction by parol: Court and jury.*
(3) *Evidence: Transactions with person since deceased.*

1. A written receipt, signed by a corporation and acknowledging payment of an account, though contradicted, after the death of the debtor, by several witnesses, officers of the corporation, is *held* sufficient evidence of payment to carry that question to the jury.
2. The words "Received payment in full," written at the foot of a bill specifying the amount due, do not make it anything more than a mere receipt, which may be explained, varied, or contradicted by parol.
3. Officers of a corporation which is a party to an action in which the opposite party derives his title or sustains his liability to the cause of action from, through, or under a deceased person, are not incompetent under sec. 4069, Stats. 1898, to testify in respect to transactions had by them personally with such deceased person.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

Claim of plaintiff against McDonald's estate for a balance of account, $667.52 and interest, for groceries, etc., furnished by the plaintiff to the deceased and H. W. Moore as copartners prior to April 1, 1893, to which the defense was the six-year statute of limitations and payment. No proof of the former was offered. Upon appeal from decision of the county court, trial was had in the circuit court with a jury, whereon was offered in evidence a receipt by the plaintiff, which was found amongst the papers of the deceased, and was in the following words:

"West Superior, Wis., Mch. 29, 1893.

"M. Pioneer Provision Co., West Superior, Wis.

In account with Twohy Mercantile Co., Wholesale Grocers.

Mch. 28. To balance of acct..... $688 02
To merchandise.
Mch. 28. Note due..... $501 54

"Rec'd payment in full, Mch. 29, 1893.

"TWOHY MERC. CO., by Forfar."

The plaintiff offered testimony of its officers to the effect that this receipt was given without any payment whatever to it, at the request of the deceased, McDonald, to facilitate him in settling with his other creditors; that the note therein mentioned was then held by a bank, and was paid to it by McDonald, but that the account mentioned in the receipt, which was identical with the one upon which the claim was based, had never been paid, nor any part thereof; that at the time of giving said receipt McDonald promised to pay the amount of the account later, and repeated that promise at various times afterwards. This evidence was objected to, and its admission is now assigned as error, both for the reason that it seeks to modify the written receipt or settlement, and that the officers of the plaintiff corporation are incompetent witnesses as against the estate. At the close of the evidence both parties moved for direction of verdict in their favor. Plaintiff's motion was granted, and verdict directed and returned for $983.98, from judgment upon which this appeal is brought.

For the appellants there was a brief by *H. W. Dietrich* and *C. R. Fridley*, and oral argument by *Mr. Fridley*.

For the respondent there was a brief by *Ross, Dwyer & Hile*, and oral argument by *W. D. Dwyer*.

Dodge, J. 1. The court below obviously erred in taking the case from the jury by directing a verdict for the plaintiff. The written receipt, at its least effect, was a clear, definite, and solemn admission by its maker that the amount of the debt had been paid. While it is undoubted law that a mere receipt is possible of explanation, or even of denial, by parol, it yet stands as a declaration against interest most unlikely to be made unless true, and not to be lightly brushed aside. 2 Jones, Ev. § 503; *Fuller v. Crittenden*, 9 Conn. 401. It stood so in this case, and, although several witnesses testified to the contrary in their own interest, the jury, as in-

telligent men, might well have believed that plaintiff's written declaration, given while both parties were alive, and allowed to be retained by the alleged debtor, was rather to be believed than the self-profiting testimony of those witnesses who had preserved silence for years and until death had closed the only mouth which could speak against them. The question should have been submitted to them. *Lewis v. Prien*, 98 Wis. 87, 89; *Thompson v. Brennan*, 104 Wis. 564, 568. For this error there must be reversal and new trial, in view of which other questions likely to arise thereon must be decided.

2. The appellants further contend that it was error to admit any evidence whatever to contradict the written receipt. The rule of law is well settled, not only in this state but elsewhere, that a mere receipt for money is open to explanation, and may be varied or contradicted by parol. It is, in effect, only an admission that money or some other specified thing has been received. *Catlin v. Wheeler*, 49 Wis. 523; *Crowe v. Colbeth*, 63 Wis. 643. No less well established, however, is the rule summarized in *Conant v. Estate of Kimball*, 95 Wis. 550, in the following words: "Where the instrument is in the form of, and contains all the elements of, a receipt, and also includes the elements of a contract, the latter is governed by the same rules as other contracts, and cannot be varied, explained, or contradicted by parol evidence, though it may be set aside and avoided for fraud or mistake." See, also, *Randall v. Reynolds*, 20 Jones & S. 145, 147; *Burke v. Ray*, 40 Minn. 34; *Chicago, M. & St. P. R. Co. v. Clark*, 178 U. S. 353; 2 Jones, Ev. §§ 502, 503. In the *Conant Case* it was pointed out that a document such as there presented, "Received of C. F. Kimball ten dollars in full of all demands to date," on its face expressed something more than a mere receipt. While it acknowledged the receipt of the $10, it also declared the agreement of the parties that all demands in favor of the signer were, for that

consideration, discharged. The receipt before us, neither upon its face nor in the light of the attendant circumstances, expresses or indicates anything more than an acknowledgment of the receipt of the $1,189.56. Had that receipt read, "In consideration of a span of horses, payment in full is acknowledged," the same case as *Conant v. Estate of Kimball* would be before us. But in the ordinary custom of commerce the words, "Received payment in full," written at the foot of a bill specifying the amount due, ordinarily have no significance except to declare that the amount thereof has been in fact paid. They do not indicate an agreement on the part of the receiptor that by reason of the receipt of something else he has agreed that the bill shall be satisfied. So read, the paper presented is a mere receipt, a mere admission that so much money has been paid, and for that reason, if for no other, no error was committed in permitting the introduction of evidence to contradict the fact of payment thereby admitted. Of course, surrounding circumstances might be such as to render it clear that the words "Paid in full," or "Received payment in full," were intended to express an agreement of settlement or release, in which case the rule of *Conant v. Estate of Kimball, supra,* would control, but no such circumstances are here shown.

3. Another error assigned is to the overruling of objections under sec. 4069 to the competency of officers of the plaintiff corporation as witnesses to personal transactions by them with the deceased, McDonald. That question was settled in *In re Will of Bruendl*, 102 Wis. 45, 49, which is conclusive in favor of their competency.

By the Court.— Judgment reversed, and cause remanded for new trial.

MALDANER and another, Appellants, vs. BEURHAUS and another, imp., Respondents.

October 12 — October 30, 1900.

Estates of decedents: Distribution: Conclusiveness of judgment: Unnecessary recitals: Division of residue in form of securities: Mistake as to validity: Setting aside settlement: Joinder of causes of action: Limitations: Laches.

1. Sec. 3940, Stats. 1898, provides that in the judgment assigning the residue of an estate the county court shall name the persons entitled thereto and the part to which each is entitled, and that "such persons shall have the right to recover their respective shares . . . from any person having the same." Such a judgment recited that the residue consisted of "notes and mortgages and money on hand, amounting in all to the sum of $43,547.15," and assigned to each of the residuary legatees one fifth thereof, "being the sum of $8,709.43." The executors divided said notes, mortgages, and money among the residuary legatees, with their consent and co-operation, upon the assumption that all the securities were valid, and took from each a receipt for the amount. Some years afterward it was discovered that certain of the securities were forgeries or otherwise invalid; and the several persons who had received them brought suit against all the other residuary legatees to set aside the judgment and to have the true amount of the residue of the estate ascertained and to compel the defendants to pay a sufficient amount to equalize the distribution. *Held:*

   (1) The recital of amounts in the judgment was not an essential part thereof and is not conclusive upon the parties.

   (2) The division of the securities was not made by the judgment, but in effect by the parties themselves as a settlement of the estate, and having been made under a mutual mistake of fact it may be set aside on that ground.

   (3) Such division and settlement was a single transaction affecting all the parties, and there was no misjoinder of causes of action.

2. The judgment assigning the residue was entered in February, 1893. After the death, in October, 1896, of a banker through whom the decedent had obtained the securities, it was discovered that some of them were invalid through forgery or fraud of said banker, but the question as to the validity of one note and mortgage was not decided until the termination of litigation with the makers in April, 1899. The present action was commenced in August, 1899. *Held*, that it was not barred either by subd. 3, sec. 4222, Stats. 1898, or by laches.

APPEALS from orders of the circuit court for Jefferson county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

For the appellants there was a brief by *Quarles, Spence & Quarles*, and oral argument by *George Lines*. They argued, among other things, that judgments of probate courts may be set aside for fraud, accident, or mistake, the same as other judgments, by action in a court of equity. 2 Woerner, Am. Law of Administration, § 508; 2 Freeman, Judgments, §§ 484*a*, 500*a*; 2 Pomeroy, Eq. Jur. §§ 836, 837, 871; 3 id. §§ 1152–1154; *Johnson v. Coleman*, 23 Wis. 452; *Stowell v. Eldred*, 26 Wis. 504; *Barber v. Rukeyser*, 39 Wis. 590; *Hiles v. Mosher*, 44 Wis. 601; *Nevil v. Clifford*, 55 Wis. 161. The circuit court, as a court of equity, has general and original jurisdiction over the administration of estates, concurrent with the county court. And that jurisdiction will be exercised whenever it appears that a complete and adequate remedy cannot be given in the county court. *Hawley v. Tesch*, 72 Wis. 299; *Lamberton v. Pereles*, 87 Wis. 449; *Meyer v. Garthwaite*, 92 Wis. 571; *Gianella v. Bigelow*, 96 Wis. 185; *Burnham v. Norton*, 100 Wis. 8; *Hill v. True*, 104 Wis. 294; *McLachlan v. Staples*, 13 Wis. 448; *Bassett v. Warner*, 23 Wis. 673; *Catlin v. Wheeler*, 49 Wis. 507–520; *Black v. Whitall*, 9 N. J. Eq. 572; *Baker v. O'Riordan*, 65 Cal. 368; *Vanmeter v. Jones*, 3 N. J. Eq. 520; *Arnold v. Spates*, 65 Iowa, 570; *Ridenbaugh v. Burnes*, 14 Fed. Rep. 93; 11 Am. & Eng. Ency. of Law (2d ed.), 1315, 1316. As to what constitutes inadequacy of remedy, see *Ryan v. Schwartz*, 94 Wis. 403; Gary, Probate Law, § 23*a*.

Harlow Pease, for the respondent *Maldaner*, contended, *inter alia*, that several causes of action are improperly united. Each one of the plaintiffs has a separate cause of action, distinct and independent of the other. They have no common pecuniary interest. *Barnes v. Beloit*, 19 Wis. 93, 95; *Shanahan v. Madison*, 57 Wis. 276, 283. An action does not lie by a legatee to set aside an assignment of a

chose in action by an executor on the ground of inadequacy of consideration and mistake on the part of the executor as to the value of the claim, in the absence of actual fraud or collusion. *Deffendarfer v. Dicks*, 20 Weekly Dig. 507; *Levy v. Passavant*, 19 App. Div. 71; *Vietor v. Levy*, 72 Hun, 263, affirmed, 148 N. Y. 739; *Penny v. Martin*, 4 Johns. Ch. 566. When one of the distributees under a will consents to take a portion of the property allotted to him, though unequal in value, it is a waiver of any objection for want of a just division. *Desverges v. Desverges*, 31 Ga. 753; *Grady v. Porter*, 53 Cal. 680, 686; *Tobelman v. Hildebrandt*, 72 Cal. 313, 316; *Barlage v. D., G. H. & M. R. Co.* 54 Mich. 564, 570; *Whitman v. Watson*, 16 Me. 461; *Smith v. Payne*, 2 Bush, 583; *Haden v. Haden's Heirs*, 7 J. J. Marsh. 168.

John G. Conway, for the respondent *Beurhaus*, contended, *inter alia*, that all the actions and inactions of the plaintiffs in reference to the Tesch papers and the Gogert papers, as shown by the complaint, manifest such laches, gross carelessness, indifference, and negligence in reference to those papers, and their respective rights under them, as to preclude them absolutely from recovery against this defendant. *Powell v. Murray*, 2 Edw. Ch. 636; *Hammond v. Hopkins*, 143 U. S. 224; *Norris v. Haggin*, 136 U. S. 386; *Carmichael v. Argard*, 52 Wis. 607; *Conner v. Welch*, 51 Wis. 431, 443; *In re Estate of Holden*, 37 Wis. 98, 107; *Coon v. Seymour*, 71 Wis. 340; *Rogers v. Van Nortwick*, 87 Wis. 414; *Thomas v. Thomas*, 88 Wis. 88; *Melms v. Pabst B. Co.* 93 Wis. 153, 173. The allegations of the complaint that the plaintiffs were not aware of the invalidity of the notes and mortgages in question "until some months after the death of W. T. Rambusch," is an insufficient statement of the time at which the plaintiffs learned of the frauds that had been committed by Rambusch. In this the complaint is fatally defective. *Marsh v. Whitmore*, 21 Wall. 178; *Rogers v. Van Nortwick*, 87 Wis. 414, 429.

CASSODAY, C. J. This action was commenced August 19, 1899, by the plaintiffs, *Mary* and *Arthur Maldaner*, against the defendants, *Pauline Beurhaus*, *Matilda Maldaner*, Edward Maldaner, and William Volckmann, to vacate and set aside a judgment and decree of the county court of Jefferson county entered February 21, 1893, assigning the estate of Henry Maldaner, deceased, and for an accounting, and that the true residuum of such estate be ascertained, and that the defendants *Pauline*, *Matilda*, and Edward be severally required to pay to the plaintiffs a sufficient amount to make the share of each of them equal to the share of such defendants. The defendants *Pauline* and *Matilda* each separately demurred to the amended complaint. The court entered two separate orders, one sustaining each of such demurrers. The plaintiffs bring a separate appeal from each of such orders.

The amended complaint alleges, in effect, that December 23, 1891, Henry Maldaner died at his domicile in Watertown, leaving a last will and testament, a copy of which is annexed to, and made a part of, such complaint, and which will was duly admitted to probate in said county court, February 2, 1892; that letters testamentary were thereupon issued to the defendant William Volckmann and the plaintiff *Mary Maldaner*, as executor and executrix of such will; that after paying and discharging all debts of the estate and all expenses of the administration thereof, and on February 21, 1893, such executor and executrix duly filed their final account, and prayed for the settlement and allowance thereof, and for their discharge; that such account represented that they had on hand for distribution and assignment, in money, securities, and property, the amount of $43,547.15 in value; that thereupon and on the same day the county court made and entered an order and decree therein assigning such residue, as provided by the will, in equal parts to the plaintiffs and defendants *Pauline*, *Mary*,

and Edward, subject to certain deductions on account of payments theretofore made to the plaintiffs, and decreeing that the executor and executrix, upon payment of the several sums specified in such decree to the plaintiffs and defendants named, and the filing of receipts therefor, be discharged from such trust; that a copy of such decree is annexed to, and made a part of, such complaint.

The complaint further alleges that thereafter, and in pursuance of such decree, the executor and executrix paid and assigned to each of the plaintiffs and each of the three defendants named money, securities, and property purporting to be the amount and value of the several sums directed in and by such decree, and took from each of such persons, respectively, receipts therefor and filed the same in the county court; that among such assets were a note and mortgage purporting to have been executed by one John Tesch for $1,600 and interest, and also a note and mortgage purporting to have been executed by one Frederich Gogert for $3,000 and interest; that at the time of such settlement the Tesch note and mortgage, with the accrued interest, amounted to $1,707.16, and the same was assigned to the plaintiff *Mary Maldaner*, by such executor and executrix, as a part of her distributive share of such estate; that after the death of one W. T. Rambusch, October 18, 1896, it was discovered that the Tesch note and mortgage had been forged by Rambusch, and was of no value; that at the time of such settlement the Gogert note and mortgage, with accrued interest, amounted to $3,195, and the same was assigned to the plaintiff *Arthur Maldaner*, by such executor and executrix, as a part of his distributive share of such estate; that after the death of Rambusch it was discovered that, in truth and in fact, Gogert received, upon the execution of that note and mortgage, only $2,000, and that he and his wife were induced to sign such instrument through the false and fraudulent representations of Rambusch; that upon the discovery

of such fraud and misrepresentations, after the death of Rambusch, the plaintiff *Arthur Maldaner* surrendered that note and mortgage, and took from Gogert and wife a new note and mortgage for $2,000 only; that the testator received such notes and mortgages from Rambusch, who, to conceal such forgery and fraud, had, from time to time, paid what purported to be the interest due thereon; that the plaintiff *Arthur Maldaner* became of age October 21, 1895; that upon such settlement he received a certain other note and mortgage, which the testator had obtained through Rambusch, and which the maker thereof claimed to have been altered by Rambusch, and refused to pay until suit brought, which was finally decided April 10, 1899, and until then it was impossible to determine whether such note and mortgage were void or valid, and hence the delay in bringing this action.

By the terms of the will, a copy of which is annexed to, and made a part of, the complaint, the residue of the estate was to be equally divided among the widow, *Mary Maldaner*, and the five children of the testator, Frank J., *Pauline*, *Matilda*, Edward, and *Arthur*. It appears from a copy of the decree of the county court, which is annexed to, and made a part of, such complaint, that the son Frank J. had, prior to the rendition of such decree, assigned and transferred all his interest in the estate to the executors for the benefit of the other residuary legatees under the will, in compromise, settlement, and payment of his indebtedness to the estate. Accordingly, such decree of the county court ordered and adjudged that such residue of the estate, consisting of notes and mortgages and money on hand, amounting in all to $43,547.15, be, and the same was thereby, assigned to such other residuary legatees, *Mary*, *Pauline*, *Matilda*, Edward, and *Arthur*, being one fifth thereof,— that is to say, $8,709.43 — to each,— except that from the one-fifth to *Mary* was to be deducted $51.30, which had there-

tofore been paid to her, and further except that from the one-fifth to *Arthur* was to be deducted $465.39, which had theretofore been paid to him.

Such residue of the estate was so assigned under and by virtue of the statute, which declares that "the county court shall, by an order or judgment, assign the residue of the estate, if any, to such other persons as are by law entitled to the same. In such order or judgment the court shall name *the persons and the part* to which each shall be entitled. Such persons shall have the right to recover their respective shares from the executor or administrator *or from any person having the same.*" Sec. 3940, Stats. 1898. It will be observed that this statute did not require the county court to name the aggregate amount of such residue, nor the amount in dollars and cents which each person was to receive, but simply to "name the persons and the part to which each" was entitled. This was satisfied by naming the persons and adjudging that each was entitled to one fifth of such residue, less the respective amounts which theretofore had been paid to two of them. In stating that such residue consisted of "notes and mortgages and money on hand," amounting in all to $43,547.15, and that the one-fifth share of each amounted to $8,709.43, less the deductions mentioned in the case of two of them, the court was merely stating what appeared from the final account of the executor and executrix filed on the day of the entry of such decree. The statute quoted did not require, and the court did not find, nor undertake to find, the value of any notes and mortgages on hand. The court was not called upon to make partition of the estate, and did not undertake to make such partition. Secs. 3942, 3947, 3952. The court might have ordered the sale of such notes and mortgages, but it did not. Sec. 3924. The court did not adjudge, nor undertake to adjudge, that the Tesch note and mortgage should be the property of the plaintiff *Mary*, nor that the Gogert note and

mortgage should be the property of the plaintiff *Arthur*. On the contrary, and as indicated, the court simply assigned such residue of the estate, including both of those notes and mortgages, to the five residuary legatees named, "in equal shares, being one fifth thereof to each." By such decree, therefore, the Tesch note and mortgage and the Gogert note and mortgage became the property of all five legatees, each of the five becoming the owner of the undivided one-fifth of such notes and mortgages, respectively.

It appears from the complaint, in effect, that after the entry of such decree, and in pursuance thereof, and upon the assumption that the two notes and mortgages were genuine and that each represented a *bona fide* indebtedness for the amount stated therein, the executor and executrix, with the consent and active co-operation of all the five persons named, partitioned such residue equally, as they supposed, among such five persons, by giving to each certain specific property, and taking from each a receipt for what would have been the true amount if all of such securities had been genuine and taken without fraud, and filed such receipts. Such partition of the estate, however, was not made by the decree, but by and with the consent and active co-operation of the five persons named, and as a settlement among themselves of such estate. True, the decree named the aggregate amount of notes and mortgages and money on hand, as appeared from the account of the executor and executrix on file, and the one-fifth thereof which would go to each, subject to the deductions mentioned in the case of two of them. But, as indicated, such recital of amounts was merely incidental, and was not necessary under the statute quoted, and hence did not constitute an essential part of the decree, and is not conclusive upon the parties. This has recently been held by very high authority. *De Mora v. Concha*, 29 Ch. Div. 268, affirmed in the House of Lords, *Concha v. Concha*, 11 App. Cas. 541; *Frame v. Thormann*, 102 Wis. 653, 671,

affirmed in *Thormann v. Frame*, 176 U. S. 350, 356; *Overby v. Gordon*, 177 U. S. 214, 224–226.

It follows from what has been said that the most important question here presented for consideration is whether such partition and settlement, so made by the parties themselves, is conclusive upon the plaintiffs, or may be partially opened and set aside for mutual mistake. It is manifest, from the allegations of the complaint, that none of the parties to this action suspected, or had any reason to suspect, any forgery or fraud as to either of the notes and mortgages mentioned, until some months after the death of Rambusch, October 18, 1896. On the contrary, it appears that Rambusch, who was, during the time, a banker, engaged largely in loaning money and collecting interest, concealed such forgery and fraud by, from time to time up to his death, remitting interest as it accrued by the terms of such notes and mortgages, and that the plaintiffs did not ascertain all of the facts in relation thereto until more than a year after the death of Rambusch. It sufficiently appears from the complaint that such partition and settlement was made while all the parties to this action verily believed that such notes and mortgages were all genuine and valid securities, and that no such partition and settlement would have been made had not all the parties to this action at the time acted under the mutual mistake that such notes and mortgages were genuine and valid securities and none of them forged or procured by fraud. Such partition and settlement having been made under such mutual mistake or ignorance of fact as to the fraud and forgery, the plaintiffs are justly entitled to relief from the same. Such is the settled law in this state as well as others. *Hurd v. Hall*, 12 Wis. 112; *Jefferson Co. v. Jones*, 19 Wis. 51; *Sexton v. Richland Co.* 27 Wis. 349; *Cleveland v. Burnham*, 64 Wis. 347; *Cady v. Bailey*, 95 Wis. 370.

The county court assigned to each of the plaintiffs the undivided one-fifth of such residue of the estate. It was supposed by all parties that they each received the same by the voluntary partition and settlement made. By reason of such mutual mistake of fact, each of the plaintiffs failed to receive such share. The statute quoted provides that they "shall have the right to recover their respective shares . . . from any person having the same." It is contended that several causes of action are improperly united; that each plaintiff had a separate cause of action and should have sued alone. But it is obvious that the partition and settlement so made by the parties was a single transaction, affecting all of the parties. It necessarily follows that all the parties are interested and have a right to be heard upon the question as to whether such partition and settlement should be partially opened and set aside, and they are each and all necessary parties to a complete determination of that question. The case is peculiarly equitable in its nature, and we perceive no misjoinder of causes of action.

Upon the facts alleged, the case is not barred by any statute of limitation nor by laches.

As we have construed the decree of the county court, the question elaborately discussed by counsel on both sides, as to the jurisdiction of the circuit court, is not here involved.

By the Court.—Both orders of the circuit court are reversed, and the cause is remanded with direction to overrule the demurrers and for further proceedings according to law.

WILLEY and another, Appellants, vs. RUTHERFORD, Respondent.

October 12 — October 30, 1900.

Real-estate brokers: Commissions: Court and jury.

Defendant, wishing to sell a farm, agreed to pay a commission to a broker if the latter would bring him a man with whom he could deal. The broker brought a man who wished to trade, but he and defendant disagreed as to values and separated, without further communication until about six months later. The broker testified that in the meantime he had several conversations with defendant, urging the latter to make the trade, the last being about two weeks before the trade was consummated. Defendant claimed that the trade was an independent transaction, brought about by another real-estate agent. The latter testified that he acted as the agent of the other party to the trade. *Held*, upon the evidence, that it was a question for the jury whether the original negotiation was completely closed and ended, so that the trade finally made was an independent one with which the broker had nothing to do.

APPEAL from a judgment of the county court of Jefferson county: GEORGE GRIMM, Judge. *Reversed.*

This is an action by real-estate brokers to recover their commissions.

Many of the facts were undisputed. It appears that the defendant owned a farm of 160 acres in Jefferson county, and desired to dispose of it; that the plaintiffs were partners and real-estate agents at Lake Mills, in the same county; that the plaintiff *Dodge* met the defendant in May or June, 1898, and had a conversation with him about selling the farm, which finally resulted in the defendant's saying to *Dodge*, "I will give you one hundred dollars to bring me a man I can deal with," and *Dodge* replied, "All right, I'll set her going." After this plaintiffs endeavored to find a possible purchaser, and finally, in August following, found one Schrank, who owned a farm of eighty acres, some miles

distant, and who wished to trade for a larger farm. *Dodge* brought *Rutherford* and Schrank together, and there were several interviews, but they disagreed as to values, and *Rutherford* and Schrank separated, and had no further communication together until about the 1st of February, 1899. *Dodge* testifies that in the meantime he had several conversations with *Rutherford* about the deal, and urged him to trade for the Schrank farm; that the last interview was about a couple of weeks before the deal (hereinafter stated) was made; and that he (*Dodge*) said to *Rutherford* at one of the interviews that the Schrank farm was the best deal he could find, that he better think it over, and go down and close it up, and *Rutherford* said that he would think it over but he didn't like the Schrank farm.

In February, 1899, *Rutherford* and Schrank finally traded farms, Schrank paying *Rutherford* $2.50 more per acre for the excess of land then he had offered him in August preceding. It was claimed by defendant that this trade was an entirely independent transaction, and was brought about by one Bennett, another real-estate agent, living at Jefferson. It appeared by Bennett's testimony that he had both the *Rutherford* and Schrank farms in his hands for sale; that in the latter part of January, 1899, he showed Schrank a farm near Whitewater, but Schrank did not like it, and said there was a farm near Lake Mills he liked better; that he (Bennett) concluded that he referred to the *Rutherford* farm, and went to see *Rutherford*, got him to go down to Schrank's farm again, and the trade was consummated; that he was acting in that matter as agent for Mr. Schrank. *Dodge* testified that he learned of the deal soon after it was made, and saw *Rutherford*, and asked him what he traded for, and *Rutherford* told him he traded "with your man Schrank."

A verdict for the defendant was directed, and from judgment thereon the plaintiffs appealed.

For the appellants there was a brief by *Rogers & Rogers*, and oral argument by *W. H. Rogers*.

N. H. Falk, for the respondent, as to plaintiffs' right to a commission, cited 4 Am. & Eng. Ency. of Law (2d ed.), 977, 978; *Livezy v. Miller*, 61 Md. 336; *Walker v. Osgood*, 93 Am. Dec. 168, note; *Platt v. Johr*, 9 Ind. App. 58; *Watts v. Howard*, 51 Ill. App. 243; *Tinsley v. Scott*, 69 Ill. App. 352; *Whitcomb v. Bacon*, 64 Am. St. Rep. 317, and cases cited; *Francis v. Eddy*, 49 Minn. 447; *New York & B. D. E. Co. v. Traders & M. Ins. Co.* 42 Am. Rep. 440; *Earp v. Cummins*, 93 Am. Dec. 718.

WINSLOW, J. The contract between the parties was undisputed. It was not a contract to sell *Rutherford's* farm, or to find a purchaser at any specified price, but simply a contract to bring *Rutherford* a man with whom he could deal satisfactorily. The plaintiffs did produce a man with whom *Rutherford* finally made a satisfactory trade, and the only possible question in the case was whether the deal finally made can fairly be said to have been made as a result of the efforts of the plaintiffs. Was the transaction a continuous one notwithstanding the temporary suspension of negotiations? It may, perhaps, be true that there might have been so complete and final a closing of the negotiations between *Rutherford* and Schrank in August that the agreement made in February would be considered an entirely new transaction, but there was certainly considerable evidence in the case tending to show that the matter was never definitely closed, that both parties were still considering it, and that the dealings in February were simply a renewal or continuation of the original deal. The appearance of Bennett in the February transaction is not a controlling fact, although it is entitled to consideration. He was acting, as he testified, simply as Schrank's agent, so that his action in going to see *Rutherford* was really as if Schrank himself had gone to see *Rutherford* and again opened the matter.

It is entirely clear to our minds that the evidence did not warrant the court in saying that the original negotiation brought about by the plaintiffs was completely closed and ended, and that the February deal was an independent and separate transaction, with which the plaintiffs had nothing to do. The question was for the jury.

By the Court.— Judgment reversed, and action remanded for a new trial.

WYSS, Respondent, vs. GRUNERT and others, Appellants.

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108 38
112 [1]631
108 38
113 [1]170

October 13—October 30, 1900.

Appeal: Review of findings: Joint tort-feasors: Rescission of contract: Restoration to previous condition.

1. The findings of a referee on controverted questions of fact, confirmed by the court having original jurisdiction over the matter, cannot be disturbed on appeal unless they are against the clear preponderance of the evidence, indicating that it was not properly considered through mistake in overlooking material parts thereof or from prejudice or some other cause.
2. Where several persons are sued as jointly liable for a tort, the failure to hold one or more of them will not militate against the liability of those who are guilty.
3. The doctrine that before a person can rescind a contract for fraud he must restore the wrongdoer to his previous position, does not require the restoration to such wrongdoer of things which are of no value whatever, or the restoration to a third person of things received from him. It does not extend to *res inter alios acta.*

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Green county: B. F. DUNWIDDIE, Circuit Judge. *Affirmed as to one defendant; reversed as to the others.*

Action for damages for deceit. It is claimed in the complaint, in substance, that February 20, 1896, the Citizens' Bank of Monroe, Wisconsin, being the owner of a $2,000

note payable to its order, signed by plaintiff as accommodation maker with and for defendants *Speich* and *Marty*, received payment thereof from defendant *Grunert* and delivered the paper to him accordingly; that thereafter defendant *Grunert* caused such paper to be placed in the First National Bank of Monroe for collection and plaintiff to be notified thereof; that, believing the note was still an outstanding obligation against him as represented, plaintiff paid the same September 18, 1896, the amount of the payment being $2,147. Judgment was prayed for accordingly.

The answer of defendants was to the effect that *Grunert* did not pay the note but purchased the same and held it as an outstanding obligation against all the makers thereof until it was taken up by plaintiff as stated in his complaint.

The cause was tried by a referee, who found the facts to be, in substance, as follows: August 31, 1895, plaintiff, at the request and for the accommodation of defendants *Speich* and *Marty*, joined with them in making a $2,000 note to the Citizens' Bank of Monroe, Wisconsin, on which the interested makers obtained the face thereof. February 20, 1896, defendant *Grunert*, who had extensive business dealings with *Speich* and *Marty*, at their request and on their account, paid the note to the bank, charging the amount thereof to them in his book account with them. About September 18, 1896, *Grunert* demanded payment of the note from plaintiff, who, believing it was still an outstanding obligation against him as represented by *Grunert*, paid the same, the amount of the payment being $2,147. No part of said sum has been made good to plaintiff except $300 paid by *Speich* and *Marty*. After plaintiff took up the note as aforesaid, *Speich* deeded to him a cheese factory lot claimed to be worth $250, but without any request from plaintiff.

On such facts the court rendered judgment in plaintiff's favor for $1,847 and interest from the time he paid the note to *Grunert*.

For the appellants there was a brief by *P. J. Clawson* and *A. S. Douglas*, and oral argument by *Mr. Clawson*, *Mr. Wm. Smith*, and *Mr. James Lane Allen*.

For the respondent there was a brief by *Colin W. Wright*, attorney, and *Fethers, Jeffris & Mouat*, of counsel, and oral argument by *M. G. Jeffris*.

MARSHALL, J. Did *Grunert* pay the note to the Citizens' National Bank? An affirmative answer to that will conclude *Grunert* on this appeal. A negative answer will require a reversal as to all the defendants.

It appears that *Speich* and *Marty* operated several cheese factories during the time covered by the transaction stated in the findings, and that *Grunert* handled their products and was largely their financial agent. The Citizens' Bank, desiring payment of the *Wyss* note, Durst, the cashier of the bank, suggested to *Grunert* to take it up because of his business relations with *Speich* and *Marty*. That resulted in *Grunert* paying to the bank the amount of the note and taking the paper into his possession. The direct evidence of what occurred at that time was given by *Grunert*, Durst, and Hodges, the assistant cashier of the bank. *Grunert* testified, in substance, as follows: 'I was security for a large amount for *Speich* and *Marty*. I had signed for $5,000 for them at the bank. Durst called on me several times to get *Speich* and *Marty* to reduce their indebtedness to the bank. I agreed to buy the $2,000 note on condition that my indebtedness could run. I dealt with Hodges when the note was taken up. I directed Hodges not to stamp the note paid, as I wanted to keep it. I said I wanted it understood that I was buying the note.' *Grunert* further testified as to the subsequent transactions with the note: 'After I purchased the note and before it was finally paid, I sold it to the First National Bank and afterwards took it back. While the note was in the First National Bank, *Wyss* was

notified to pay it, and thereupon Durst called upon me saying he thought *Speich* and *Marty* paid it long before, but, if such was not the case, if I would return the paper to the Citizens' Bank *Wyss* would pay it. I followed that suggestion and received my pay from Durst.'

Durst testified that when *Grunert* obtained the note there was no talk about extending time on his paper as a consideration for taking up such note; that there was no offer to sell the paper, nor intention to do so. But he further testified that he took no part in the actual deal between the bank and *Grunert;* that it was conducted on the part of the bank by Hodges. Hodges testified as follows: "I do not remember exactly what was said when the note was transferred to *Grunert.* He indicated that he wanted the note paid, referring to it as the '*Wyss* note,' and I got it out of the case and computed the interest. I do not know as there was anything said in respect to the matter. I started to stamp the note paid. He indicated that he did not wish it stamped, and then I delivered it to him. The note was paid as far as our understanding went. We got our money on the note. According to my recollection *Grunert* did not propose to buy the note, and there was no proposition on the part of the bank to sell it. He did not ask or give any intimation that he wanted to buy the note."

The following circumstances corroborate what Hodges and Durst said was their understanding of the transaction: The paper was turned over to *Grunert* without indorsement though it was payable to the order of the bank. *Grunert* charged the money paid for the note to *Speich* and *Marty* in his account with them, though he kept a bills receivable account on his books. He rendered a statement of the book account to *Speich* and *Marty*, indicating that they were charged with the money paid for the note. He did not notify *Wyss* of his ownership of the paper till about seven months after he obtained it, and not until the financial condi-

tion of *Speich* and *Marty* became such as to lead him to believe that he could not collect it of them. The following circumstances corroborate *Grunert's* testimony: When the note was delivered to him, by his direction it was not stamped as is the usual custom when paper is actually paid over a bank counter. *Grunert* sold and indorsed the paper to the First National Bank of Monroe some six months or more after he obtained it. The memorandum on the stub of the check used in paying the money to the bank was to the effect that it was paid on a purchase of the paper. After *Wyss* paid the note he pressed *Speich* and *Marty* to reimburse him, and they made no claim that it had been paid by *Grunert*. *Speich* and *Marty*, in order to pay their outstanding indebtedness to the patrons of the cheese factories, avoid making an assignment, and satisfy *Wyss*, arranged with such patrons for a reduced price for milk so as to increase the profits of the business, and turned the factories over to *Wyss*, conveying to him at the same time some manufactured products on hand and all the tools in and for use in the business, valued in the bill of sale at $830. They also delivered to *Wyss* at the same time notes aggregating $1,000, and *Speich* gave a deed of a cheese factory lot valued at $250. There are a number of other circumstances but they are not of sufficient significance to materially add to the evidence before referred to.

The circumstance of the note being turned over without indorsement is without any reasonable explanation that can readily be suggested consistent with the theory that it was sold. On the other hand, the fact that the paper was not stamped paid is quite as persuasive in favor of the theory that it was purchased. The only explanation of the circumstance that the amount paid by *Grunert* for the note was charged by him to *Speich* and *Marty* as money due on account and billed to them as such in a statement subsequently rendered to them, is that they wanted such a statement so

as to exhibit their condition as regards their entire indebtedness to *Grunert*, and that subsequently the note was taken out of the account and placed in bills receivable, where it in fact belonged. The circumstance that *Grunert* kept the note in his possession instead of delivering it to *Speich* and *Marty* is consistent with the theory of a purchase; but the circumstance that the paper was held for months without any intimation to *Wyss* that it had not been paid, indicates that *Grunert* intended, in taking it from the bank, to pay it, and that his claim made a long time thereafter on *Wyss* was a subterfuge to prevent his losing on account of operations with *Speich* and *Marty*. The circumstance that Durst called on *Grunert* for the note as the agent of *Wyss*, when the latter was requested to pay it, is explained by the fact that he then stated that he supposed the paper had long since been paid. That is consistent with his testimony that he had no definite recollection of the circumstances of the note leaving the bank, but supposed *Grunert* took it up by paying it. The circumstance that *Speich* and *Marty* made no claim that the note had been extinguished by *Grunert*, when pressed by *Wyss*, is consistent with *Grunert's* claim, since they had received a statement from *Grunert* in which the note was charged to them as an outstanding obligation. There is reason for saying they honestly and reasonably believed they were liable upon the note. Again, it was not very material to them whether the debt was due to *Wyss* or *Grunert*. It is not improbable that they then preferred to deal with *Wyss* rather than *Grunert*, hoping to get him to take the factory business off their hands or aid them in continuing it. The circumstance of the sale of the note by *Grunert* to the First National Bank of Monroe, of itself, has very little significance. Such as there is creates suspicion of *Grunert's* claim of ownership of the paper. It is not infrequent that a person reaches another with a demand against him that is subject to question, through a third person as owner.

Grunert evidently desired to dispose of the note to the bank, or to have the bank appear to be the owner, and to reach *Wyss* with a demand for its payment in that way instead of performing the rather unpleasant task himself of presenting it to *Wyss* for such payment.

The above review of the evidence and conclusions disclosed thereby sufficiently shows that it cannot be said that the finding of the referee is clearly against the preponderance thereof. When there is a clear conflict of evidence and of the reasonable inferences therefrom, so much depends upon the appearances of witnesses, their manner on the stand, and the personal study of them during the trial which the careful trier will give in order to accurately weigh the evidence, that it is not safe to disturb his findings except in a clear case. There is a wide difference between preponderance of evidence on one side of a controversy and clear preponderance on the other. So, when the trial judge or referee, with the peculiar advantages of his position, decides as to where the truth lies on a controverted question of fact, it is not often that such decision is disturbed. In order to justify such disturbance, the evidence must not only preponderate against the finding, but the overbalancing that way must be sufficiently significant to produce conviction that the evidence did not receive proper consideration by the trial court, through mistake in overlooking material portions thereof or from prejudice or some other cause. That is plainly requisite to fully satisfy the rule as laid down in the books and supported by the adjudged cases, that the findings of a referee, confirmed by the court below, will not be disturbed unless against the clear preponderance of the evidence, which rule is the test to be applied to a referee's findings according to the decision of this court. *Zoesch v. Thielman*, 105 Wis. 117.

The test above indicated plainly precludes disturbing the findings of fact on the subject of whether the note was pur-

chased of or paid to the Citizens' Bank. The direct evidence is clearly in conflict. There are significant circumstances established that point both ways, some of which, on both sides, are susceptible of reasonable explanation, and some are not. Even if we were to weigh the probabilities in order to arrive at a conclusion, it is not clear upon which side the preponderance would be. The strongest circumstance in appellant's favor is the fact that he took the note, accompanying the act with a declination to having it canceled. That, without corroboration, is not enough to warrant finding that the transaction was a sale. A sale requires a precedent executory contract, one party agreeing to sell and the other to buy. The consummation of the contract requires a transfer of the title of the subject of sale with intent to execute it. Where there is a mere taking up of a note by a stranger, it being delivered uncanceled, by request, without any other circumstance, the presumption of law is that a payment of the note was intended and that the note is thereby extinguished. 2 Edwards, Bills & N. § 728; *Lancey v. Clark*, 64 N. Y. 209; *Binford v. Adams*, 104 Ind. 41; *Dougherty v. Deeney*, 45 Iowa, 443; *Swope v. Leffingwell*, 72 Mo. 348.

As to appellants *Speich* and *Marty* we are unable to discover anything in the facts found by the referee to support the judgment. The most respondent claims the evidence shows is that they failed to notify *Wyss* that the note had been paid when he pressed them for payment thereof and that they thereby aided *Grunert* in carrying out his scheme of saving himself harmless from loss by treating the paper as an outstanding obligation against *Wyss*. The trouble with that is, there is no finding to that effect, and the evidence by no means clearly establishes the claim that when *Wyss* called upon *Speich* and *Marty* for payment they knew the note was not in existence as a legal obligation. *Grunert* on one occasion gave proof to them that the money due him

was on account and not on the note, and upon another occasion that he held the note as an outstanding obligation. It had never been delivered to them and they may well have understood that *Grunert* understood that the paper had not been extinguished. It is one thing to sustain the finding of a referee confirmed by the court below; it is quite another to make a finding in this court from evidence found in the record. The latter requires clear and convincing proof. Mere evidence from which a finding might reasonably have been made is not sufficient. While we have passed on the question of whether the evidence connected *Speich* and *Marty* with the wrong to plaintiff, the complaint is as barren as the findings of fact and the evidence of any suggestion that they were guilty participants in the wrong. There is no cause of action stated or even attempted to be stated against them in the complaint so far as we can discover.

The failure to hold two of the defendants liable to plaintiff does not of itself militate against holding *Grunert*. If the theory of the complaint were that there was a fraudulent agreement between the three appellants executed to plaintiff's damage, it would show a several as well as a joint liability. The concert of action would be material only in order to show a joint liability rendering all severally liable also for the result of the wrong, without regard to the relative benefit they obtained. *Fountain Spring P. Co. v. Roberts*, 92 Wis. 345. The wrong to plaintiff was remediable by an action for deceit whether it was committed by one of the parties acting alone or by all of them acting in concert. So the failure to hold *Speich* and *Marty* is of little significance on the question of whether *Grunert* is liable.

It is said this action was not maintainable because the evidence shows respondent received full reparation from *Speich* and *Marty* for any wrong done him; that he collected of them the full amount of the payment made to *Grunert*. We do not deem it necessary to discuss at length the evi-

dence upon which that contention is based. Looking at it in the most favorable light for appellants, there was considerable property turned over to respondent to secure him in part against loss from having paid the note. We fail to find any evidence showing, or definitely tending to show, that respondent received anything mitigating his damages for the wrong complained of, except $300 allowed by the referee for a note turned over to him by appellants *Speich* and *Marty*. If the conveyance of property to *Wyss* had anything to do with the claim against *Grunert* or the claim against *Speich* and *Marty*, on account of the $2,000 note — and we are inclined to think it had as to the latter, though that is in dispute — it was by way of mere security, not payment, and nothing has been realized except as indicated. So respondent's damage, at the time of the commencement of the action, was the amount paid *Grunert*, less $300, the amount awarded him by the judgment.

A further point is made that this action is not maintainable without restoring defendants to their former situation. How such failure would affect *Speich* and *Marty*, if the facts showed they were otherwise liable, need not be discussed. As to *Grunert*, the rule invoked has no application, because respondent received nothing of value from him. Having received nothing of value, there was nothing to be returned as a condition precedent to the commencement of the action. *City Nat. Bank v. Kusworm*, 88 Wis. 188; *Higham v. Harris*, 108 Ind. 246; *Snow v. Alley*, 144 Mass. 546, 554. The doctrine that a person cannot rescind a contract or sue for money or property parted with thereon, on the ground of fraud, without returning to his adversary what he himself received on it, refers to the relations between the parties to the contract, not to the rights of strangers thereto. As said in *Gay v. D. M. Osborne & Co.* 102 Wis. 641, rules of law are supposed to be consistent with reason and com-

mon sense when applied to the rescission of a contract upon the ground of fraud the same as to any other subject. The right of rescission, though legal, is based on equitable principles, therefore the requisites of its exercise should go no further than strict compliance with the dictates of good conscience requires. For what reason should respondent return to *Speich* and *Marty* the security he holds from them, if any, as a consideration for recovering from *Grunert?* Where does *Grunert's* equity come in as to that in excess of the actual amount *Wyss* has recouped from *Speich* and *Marty?* The answer must be that there is no such equity. The things of value received on a contract to be returned as a condition precedent to rescission, are those received of the wrongdoer. He has no right, legal or equitable, to anything received of a third person, except as the damages inflicted by him are thereby reduced. Many illustrations of this doctrine, touching the circumstances of this case on the branch here under discussion at all points, might be given. In *Stevens v. Austin*, 1 Met. 557, B. received a note from A. for goods fraudulently obtained of him. A. conveyed the goods to C., who took with knowledge of the fraud. *Held*, that B. could recover of C. without returning the note to A. SHAW, C. J., in delivering the opinion of the court, said: "The question is, whether the plaintiff was bound to tender back the note and money he had received, before he could bring his action. We think he was not. Not to the defendant; for the plaintiff had received nothing from him. Nor could the defendant raise the question of whether the plaintiff had made restoration to A. or not. It was *res inter alios*, with which the defendant had no concern, and was wholly irrelative to the issue between the parties." To the same effect are *Snow v. Alley*, 144 Mass. 546; *Thayer v. Turner*, 8 Met. 550.

What has been said covers all questions presented on the

appeal. As to appellant *Grunert* it requires an affirmance of the judgment, but as to appellants *Speich* and *Marty* the judgment must be reversed.

By the Court.— The judgment appealed from is reversed as to *Speich* and *Marty* and affirmed as to *Grunert*, costs in this court to go against respondent for clerk's fees and printing. The cause is remanded with directions to modify the judgment in the circuit court accordingly, dismissing the case as to *Speich* and *Marty*, with costs.

FILLINGHAM, Respondent, vs. NICHOLS and wife, Appellants.

108 49
108 456
108 49
109 328
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113 *309
108 49
57 LRA 460

October 13 — October 30, 1900.

Trusts and trustees: Absolute conveyance: Execution and suppression of deed: Evidence.

1. In the absence of fraud, accident, or mistake the grantor will not be permitted to prove that a deed absolute on its face was given in trust for his benefit.
2. Findings of the trial court to the effect that at the time of the execution of a deed by plaintiff and her husband (since deceased) to defendant the latter executed a conveyance of the same land to plaintiff, and that afterwards, having possession of both instruments, defendant fraudulently suppressed or destroyed the conveyance to plaintiff, and hence that the defendant should be compelled to convey to plaintiff or the title be vested in her by judgment, are *held* not to be supported by sufficient evidence.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

This action was commenced to compel the defendants to deed to the plaintiff certain property described in the complaint, situated in the city of Beloit, Wisconsin. The facts disclosed by the evidence and the findings are as follows: The plaintiff and Robert Hall were husband and wife, and in

1894 Hall was seventy-five years of age, and plaintiff sixty-one. Hall died February 20, 1896, leaving no children, the plaintiff being his sole heir. The defendants are husband and wife. Hall took the defendant *John Nichols* into his family when he was about three years of age, and always treated him as a son. Hall had children, but all of them were dead. The plaintiff was his second wife. In 1894 Hall owned the property described in the complaint, which consisted of three store buildings and the land upon which they were situated, yielding an average yearly income of about $900 or $1,000. He also had a homestead, worth from $1,500 to $3,000, life insurance of the face value of $4,100, a note of *Nichols* for $1,000, and other personal property of the value of about $300. On August 9, 1894, Hall and plaintiff executed and delivered to *Nichols* a warranty deed of the three store buildings, which was recorded September 20, 1898. The plaintiff claims, and the court so found, that at the time of this transaction Hall desired to convey this property to her; that he believed the only method of so doing was to deed to a third party; that he had confidence in *Nichols*, and, upon his promise to convey the property to plaintiff, the deed above mentioned was made for the sole and only purpose of getting the title to said premises in plaintiff.

Findings 6 and 11 — the ones most vigorously attacked — are as follows: "(6) That the said *John Nichols* about the same time conveyed said premises to this plaintiff, and that both of said deeds were placed in a drawer in the safe then in the store of said *Nichols*, with the other papers of said Robert Hall in the drawer of said safe of said *John Nichols*, and where at the time the said Hall kept his papers, and to which drawer the said Hall had a key." "(11) That on or about the 28th day of September, 1898, and at the time when this plaintiff was very sick, said *John Nichols*, with intent to cheat and defraud the plaintiff out of said premises,

caused to be duly recorded in the office of the register of deeds for Rock county, Wisconsin, the said deed from said Robert Hall and the plaintiff to the said *John Nichols*, and suppressed and concealed or destroyed the said deed from said *John Nichols* to this plaintiff. And that said *John Nichols* has always, until said September 28, 1898, acknowledged said plaintiff to be the owner of said premises, and acted as the agent of this plaintiff in the care thereof, and until after September 28, 1898, never in any manner claimed to be the owner thereof, or any interest therein, and that neither of said defendants were the owners of any interest in said premises."

The defendants' answer sets forth that for many years *Nichols* had worked for Hall, and received little or no compensation other than his support. That in 1889 he was about to leave Beloit and engage in business elsewhere, when Hall requested him to remain, and agreed that if he would so remain and aid him in caring for his business affairs he would give him his business property, consisting of the property mentioned, reserving the income thereof for himself and plaintiff during their lives; that the deed of August 9, 1894, was executed pursuant to this agreement, and that *Nichols* had collected the rents, and, after paying insurance, taxes, and repairs, had paid the remainder to Hall and to plaintiff, until June, 1899, when, at the request of the plaintiff, the collection of the rent, etc., was turned over to her.

Upon the trial the court made findings sustaining the plaintiff's theory, and entered a judgment against defendants, from which they have taken this appeal.

E. D. McGowan, attorney, and *H. W. Chynoweth*, of counsel, for the appellants.

For the respondent there was a brief by *J. B. Dow* and *Smith & Pierce*, and oral argument by *Wm. Smith* and *C. E. Pierce*.

BARDEEN, J. Unless the finding can be sustained that *Nichols* made a deed of the premises in suit to plaintiff and thereafter suppressed it, the plaintiff has no standing in court. There is absolutely no evidence that *Nichols* procured the deed from Hall and wife by fraud, accident, or mistake. In absence of a showing of such facts, the rule is universal that the grantor in a deed will not be permitted to prove that a deed absolute on its face was given in trust for his benefit. *Fairchild v. Rasdall*, 9 Wis. 379; *Clarke v. McAuliffe*, 81 Wis. 104. See *Kruschke v. Stefan*, 83 Wis. 373; *Krouskop v. Krouskop*, 95 Wis. 296. The statute (sec. 2302, Stats. 1898) requires that a trust, other than those resulting by act or operation of law, shall only be created by deed or conveyance in writing subscribed by the party creating it, or by his duly authorized agent, whose authority shall be in writing. There being no proof of the creation of any trust in the manner so pointed out, we are left to grapple with the question whether a deed was in fact executed and suppressed. To reach a proper solution of this problem, we shall first consider the relations of the parties.

Away back in the year 1847 Hall took the defendant *Nichols*, then an infant but three years of age, into his family. During his minority he treated him as a son, and received from him the service of a child. Hall was then a married man and had three children. His wife and two of his children died. In 1870 he married the plaintiff. *Nichols* continued to live in the family after the second marriage, and until his own marriage, and one year afterwards, and was treated as a son. He began in early youth working for Hall in the shoe business, and received little or no compensation beyond his support. Afterwards he became a partner with Mr. Hall, and later, upon his retirement from business, he formed a partnership with Mr. Hall's son Robert. The latter died in 1889, and *Nichols* thereafter ran the business himself. After the son's death, Mr. Hall was in no active

business. He continued to be on the best of terms with *Nichols*, called him his "dear son," and stated that he had done very much to help him accumulate his property. This was the situation of affairs when the deed to *Nichols* was executed on August 9, 1894. At that time Hall was seventy-five years of age, and in somewhat feeble health. The circumstances of the execution and delivery of this deed are especially significant. The deed was drawn under the direction of Mr. O. H. Orton, an attorney living at Beloit. Mr. Orton was produced as a witness, and detailed at length the circumstances of the transaction. He visited Mr. Hall at his house, who gave him directions as to the preparation of the deed. He wanted a simple warranty deed, and stated that all other matters with reference to the business were understood between himself and *Nichols*, and that he had the utmost confidence in his carrying out his wishes without any writing on the subject; that *Nichols* understood that he and his wife were to have the rents and profits of the property during their lives. He further told the witness that *Nichols* had always been a faithful and worthy son, and that they intended that he should have all the property after they got through with it. All they expected was the income from it, and they trusted *Nichols* to give them the profits of the property. The witness further stated that only the one deed was drawn, and that there was no talk or suggestion that *Nichols* and wife were to deed this property to *Mrs. Hall.* Orton went to his office, caused the deed to be drawn, and went back, had it executed, and took the acknowledgment. He took with him a Mr. Sandall to witness the deed, who was also produced as a witness. To him Mr. Hall stated that he was anxious to have the matter fixed up because he wanted *Nichols* to have what he considered to be his just due. He had always been a good boy, and he (Hall) had always looked upon him as a son, and now, as he had no children of his own, all they cared for was the use

of the property as long as they lived, and that they would trust him as to their securing the rents from it. This conversation was had in the presence of *Mrs. Hall*, who duly signed and acknowledged the execution of the deed. By Mr. Hall's direction, Orton took the deed to his office, and thereafter delivered it to *Nichols*. In the fall of that year Mr. Hall told Mr. Hayward, an old-time friend, that he had deeded a part of his property to *Nichols*. In the spring of 1895 he made a similar admission to another witness. There is also testimony from other witnesses along this same line made at later dates. These are undisputed facts in the case.

We have thus far purposely omitted reference to the testimony of defendant *Nichols*. He gave testimony strongly supporting his side of the case. He is, however, an interested party. Some of his testimony was clearly incompetent under the statute, as was also some of the testimony given by plaintiff, which covered transactions with the deceased. He is in direct dispute with a large number of witnesses who testified to admissions claimed to have been made by him regarding the title to the property, and concerning which we will have something to say hereafter. Both himself and *Mrs. Nichols* deny that they ever executed any deed to the plaintiff. No such deed was produced, and no witness was sworn who ever saw any such instrument, or who was willing to say that such a paper was ever drawn or ever had legal existence. Whether any such deed ever in fact existed is a pure matter of speculation. The trial court, by its sixth finding, says that about the time the deed to *Nichols* was executed he conveyed the premises in question to plaintiff, and that both deeds were placed in a drawer in his safe, with other papers of Hall's, and to which drawer Hall had a key. No one pretends that there is any direct testimony to support this finding. Such a finding seems to have been deemed necessary to support the theory of a delivery of the deed. Neither has the eleventh finding, regarding the con-

cealment and suppression of this deed, any direct evidence to support it. Both findings rest upon inferences and deductions from the testimony, which are claimed to be of such probative force as to warrant the conclusion reached. The plaintiff's case rested, first, upon declarations and statements of *Nichols;* second, upon declarations and statements of Hall; and, third, upon the conduct of the respective parties. With reference to the alleged admissions made by *Nichols*, they may be summarized by the statement that at different times, and especially after Mr. Hall's death, he stated in casual conversation with the different witnesses that Hall had deeded the stores to *Mrs. Hall*, or that she owned all the property and he was left nothing, and that he thought that Mr. Hall had been unfair to him. With one or two exceptions, these statements were made to parties who had no interest in the controversy, and who were merely attempting to satisfy an idle curiosity. In view of what this court has frequently said regarding this class of testimony, it is hardly necessary to do more than refer to the cases. It is universally considered as the weakest kind of evidence that can be produced. *Haven v. Markstrum*, 67 Wis. 493; *Emery v. State*, 101 Wis. 657. The same is true of the alleged admissions of the deceased. Moreover, the weight of such admissions is greatly lessened by the fact that proof was made of admissions by him that are directly contradictory. It should be observed also that none of the admissions alleged to have been made by *Nichols* go to the fact of the existence of a deed. They relate rather to admissions in derogation of his title, and not to the manner in which his title became divested. Considering these alleged admissions by themselves, they are hardly sufficient to create a robust suspicion against him. There are certainly some things in the conduct of *Nichols* to give color to the court's conclusion. The transfer of the insurance on the stores to *Mrs. Hall*, the giving of the note by him to her when he held her unpaid note. and the

signing of the petition for street grading as agent, are circumstances of more or less cogency in support of that view. But are they, when grouped with the other facts in the case, of such convincing weight as to completely overturn a solemn deed and convict the defendant of a criminal fraud? We think not.

This is one of the class of cases where the proof should be of the clearest and most satisfactory character to warrant relief. The proof should be such as to establish the facts beyond reasonable controversy. There can be no relaxation from this rule without greatly disturbing the integrity of titles. The rule so often laid down in cases somewhat similar to this may be found noted in the following cases: *Harter v. Christoph*, 32 Wis. 245; *Lavassar v. Washburne*, 50 Wis. 200; *Meiswinkel v. St. Paul F. & M. Ins. Co.* 75 Wis. 147. To entitle the moving party to relief, the evidence must show something more than probabilities; more than mere appearance of truth. As has frequently been said, the facts proven should be of such positive character and of such convincing force as to point to the conclusion reached beyond reasonable controversy. Giving to the evidence of plaintiff its utmost probative force, it does not go beyond the realm of probability. That is not sufficient. We are met at the outset by a solemn instrument vesting title in *Nichols*. Added to this is the positive testimony of the circumstances under which it was drawn, and of the statements made by the grantor at the time, in absolute confirmation of the defendants' position. We have an utter failure of proof as to the existence of any deed executed by *Nichols*. The execution of such a deed would be of no avail without delivery. The plaintiff makes no claim that she ever supposed any such deed was ever in existence. At one time she went so far as to deny ever having executed the deed to *Nichols*, but she was forced to abandon that position. We cannot, within reasonable limits, refer to the multitudinous

circumstances relied upon by plaintiff to establish her case. We admit that there are many things shown hard to reconcile with the fact that *Nichols* was to remain the absolute owner of this property. We meet this, however, with the extreme probability that, if Hall intended this property should be conveyed to his wife, he would have had both deeds prepared at the same time. Why should he delay or postpone it? No explanation of any kind is offered. Again, if a deed had in fact been drawn and properly executed by *Nichols* and wife, it is strange that the witnesses or the officer taking the acknowledgment have not appeared. It may be that such a deed was executed, but we are unable to say so with that certainty the law requires. Hence, in obedience to our conviction and the mandate of the law, we are compelled to reverse the judgment of the trial court, and remand the case with directions to dismiss the action.

By the Court.— So ordered.

MUSBACH, by guardian *ad litem*, Respondent, vs. THE WISCONSIN CHAIR COMPANY, Appellant.

108 57
109 246
f109 463

108 57
112 [4]228

108 57
113 [4]262

108 57
114 [4] 87
114 [4]484
f114 [4]599
57 LRA 466

108 57
e116 [2] 33
e116 [2] 34

October 15 — October 30, 1900.

Master and servant: Personal injuries: Cause of accident: Defective apparatus: Negligence of co-employee: Evidence: Burden of proof: Court and jury: Special verdict: Instructions.

1. In an action for injuries sustained by plaintiff while operating a wood-embossing machine, caused by an explosion of gasoline gas, which was used in heating the metal dies of the machines, a finding in the special verdict to the effect that the explosion was caused by leakage of the pipes under the floor of the small building in which plaintiff was working, which conveyed gasoline from an outside tank through the inclosed space beneath the floor and up through the floor to the machines, is *held* unsupported by the evidence, which fails to show affirmatively that there was any such

leakage and shows conclusively that there was neither explosion nor combustion beneath the floor.

2. It having been shown that a co-employee of plaintiff was in the habit of permitting gasoline to drip from the burner of his machine after it had been extinguished, and that enough gas might have been formed in the room in that way to account for the explosion, there could be no presumption, from the mere fact of the explosion, that there was any defect in the apparatus supplying the gasoline, but the burden was upon plaintiff to show by a preponderance of reasonably direct evidence the existence and proximate efficacy of such a defect; and it was error therefore, even upon the assumption that the accident might have been caused either by a defect or by the co-employee's negligence, to submit those two possible causes to the jury, for the adoption of one or the other, as if they stood on an entire parity as to *quantum* of proof necessary to give either its legal effect.

3. Where, as in this case, the plaintiff, upon whom the burden rests, has failed to show by any reasonably direct evidence that defendant has been guilty of any negligence which caused the injuries complained of, the court should so decide and should not, by submitting it to the jury, imply that the question is an open one.

4. Where a special verdict is taken it is not only improper but erroneous to instruct the jury generally upon the law of the case and, especially, so as to inform them of the legal effect of the answers to the questions submitted.

APPEAL from a judgment of the circuit court for Ozaukee county: JAMES J. DICK, Circuit Judge. *Reversed.*

Action to recover for personal injuries suffered by the plaintiff from an explosion of gasoline gas while he, as an employee, was operating an embossing machine; he then being about nineteen years of age and having been employed in the same capacity for about four months. The building in which the explosion took place was about twenty-eight feet long north and south, by sixteen feet wide, a single story, eaves ten feet from the floor, constructed of brick. Underneath was a space or basement inclosed by the foundation walls, some twenty inches deep, having a single opening at the south end, about eighteen inches square. The floor was double, of matched flooring, and practically

air-tight, except that it was perforated by two ⅜-inch pipes for carrying gasoline, and two 1¼-inch pipes for carrying steam, and a trapdoor. The holes through which the pipes passed were just large enough to permit them to pass through easily. The trapdoor rested by its own weight upon the joists, leaving slight cracks or interstices around it. At the south end of the building, and outside, was maintained a seven-gallon tank of gasoline, from which a ⅜-inch horizontal pipe passed through the basement northward, under the floor. Some ten feet from the south end of the building was the first embossing machine, and two feet beyond that the second. From the horizontal gasoline pipe in the basement vertical ⅜-inch pipes passed upward along the side of each of these machines, and turned at about eight feet from the floor, with a goose-neck returning to near the plates of the machine, some three or four feet from the floor. Within the same building was an air pump, which was connected with the tank outside by another pipe, so that by pumping air into the tank, up to about fifteen pounds pressure, the gasoline was forced through the horizontal pipe, and up through the vertical ones and the goose-necks, to a burner at the end of each goose-neck. These burners were equipped with a valve to permit or prevent the flow of gasoline, and were used to heat metal dies to high temperature for embossing wood. Ordinarily, one pumping would suffice to maintain pressure for one and one-half to two hours. The building had four windows and a large door.

The plaintiff and one Wolf were engaged as the night shift in the operation of these embossing machines, which consisted in sliding pieces of wood through between a roller and this heated die, whereby figures were embossed on the wood. In order to heat the die, the burner above mentioned had to be first withdrawn from a mandrel or sleeve, and lighted, and replaced in the sleeve. To do this, the ⅜-inch

pipe, bent over in a goose-neck, was supposed to furnish sufficient elasticity; but there is some evidence to establish that the operation was not always accomplished merely by bending the pipe, but that it resulted in turning the vertical pipe in its joint below the floor. The process of heating the die occupied perhaps twenty minutes. Then the flow of gasoline was properly turned off by the valve above mentioned. The die would retain sufficient heat for perhaps half an hour, when the process of heating would have to be repeated. It was not infrequent that there was some spilling of gasoline at the time of turning it on and lighting it, nor was it infrequent that the operators of the machines omitted to fully turn off the gasoline when extinguished, whereby a dripping would result. Plaintiff testifies that he never was guilty of such omission, but knew that his co-employee Wolf frequently was, which Wolf also testifies.

On July 2, 1897, at half past 1 or 2 in the afternoon, it was noticed by the day men that the vertical pipe supplying the southmost embossing machine was loose in its joint, and it was also noticed that the pressure gauge on the air pump ran down more rapidly than usual, and independently of the consumption of gasoline at the burners, from which resulted inference of a leak in the system somewhere. A man by the name of Anderson, who seems to have had no particular duties, but whose trade involved pipe fittings, was called, and attempted to tighten the vertical pipe. Not succeeding in getting it as tight as he liked, he took it out of the joint entirely, and covered it with white lead, and then screwed it back, and pinched it in tight with a wrench. This, however, did not stop, or materially diminish, the escape of either air or gasoline, indicated by the pressure gauge. He therefore examined the valves in the air pump, but found nothing to indicate defect there, and seems to have given it up as a job beyond him. The loss of pressure was not so great at that time but that work could

continue. Later, perhaps at about 4 o'clock, the running down of the pressure gauge became more rapid, and, while the day men still continued their work, they called to it the attention of Wolf, of the night shift, when he came at about half past 5. He accordingly went to one Charles Holden, who is called a foreman or subordinate superintendent, and told him of the trouble. There having, on a previous occasion, been discovered a leak in the galvanized iron tank, Holden conceived the possibility of a repetition of such defect, and called to his aid the tinner and a pipe setter. They took the tank, holding about seven gallons of oil, out of a box in which it ordinarily rested, and emptied it of gasoline; put it back in the box, filled the box with water, and then applied the air pump, with the idea that any holes in the tank would permit escape of air, which would show in bubbles. In doing this they discovered some gasoline outside of the tank, and in the wooden box, estimated by one witness to be about a quart, which it is testified must have leaked in there in some way. They found no sign of leakage in the tank, and therefore took the water out of the box and replaced in the tank the same gasoline. It was then noticed that the union which joined to the tank the gasoline pipe running in under the building was wet with gasoline, and that, in connection with the gasoline which had dripped into the box, led to the inference that the leak existed there. The union was taken off and the threads filled with white lead, and then put in place and tightened up, as a result of which the escape of pressure was very much, if not entirely, corrected. The witness Holden says that the pressure gauge stood all right. The plaintiff says that it still ran down slowly; but it is entirely obvious that the condition of things which rendered necessary the aid of Holden and his mechanics had been substantially overcome; whereupon the plaintiff and Wolf went to work at their machines a few minutes after 6.

Both of them had heated their dies once, and the plaintiff's die had again become cold, and at about 8 o'clock he proceeded to draw out the burner from the mandrel and to strike a match to light it. Just at this point, as he was applying the match, a terrific explosion took place, which lifted the roof of the building many feet in the air, blew out all four brick walls down to the floor, and blew the plaintiff, Wolf, and another young man who was in the building outside of it. The roof fell back almost vertically. The machine at which Wolf was working was tipped over and torn loose from its joints to the floor. Certain pieces of wood that were piled up for the purpose of embossing were set on fire, as also a corner of the roof, but were easily extinguished as soon as the hose was in operation. The floor of the whole building was substantially in place and undisturbed but for the tilting down of one corner, where certain defective supports had given away, and the resulting tilting up of the diagonal corner. No combustion took place beneath the floor, and, upon examination in the morning, all of the joints in the gasoline pipe beneath the floor were found to be completely tight. The plaintiff received severe injuries.

It was shown by experts, substantially without contradiction, that gasoline vaporizes readily; the vapor is heavier than air, and sinks to the lowest place, like water, but, of course, with less celerity; that it, like other gases, has another property, called "diffusion," whereby some portion of it will gradually diffuse throughout the space occupied by the air, and some portion of the air will diffuse through the space in which the heavier gasoline gas settles; that the gas from gasoline of the quality used by the defendant, when mixed with atmospheric air in the proportion of ninety-five per cent. of the latter and about five per cent. of the former, constitutes a violently explosive mixture if fire come in contact with it; that the gas from gasoline, when

in larger proportion to the air, or "richer," as it is termed, burns with great violence, but does not explode; that air currents or any other fortuitous circumstances may cause, at any point in a room, a variation in the proportions of mixture of air and gas; that in half an hour there might escape from an imperfectly closed burner enough gasoline to supply vapor or gasoline gas to constitute such explosive mixture through a space large enough to cause an explosion of the violence of that in question.

It was also shown, without substantial controversy between the experts, that to fill the basement with gasoline gas to such an extent that it would force its way upward through the interstices about the pipes passing through the floor would require some barrels of gasoline, in view of the fact that there was the opening described in the wall of the basement through which large amounts would naturally escape, its tendency being to flow horizontally, rather than upward. It was shown that no unusual amount of gasoline had been put into or flowed out of the tank, the evidence being that the ordinary consumption was the tank of seven gallons twice full in the course of the twenty-four hours; that the tank had been filled in the morning of the 2d of July, and again shortly before evening, and was nearly full the next morning. There was conflict of testimony between experts as to the propriety of using white lead in jointing gasoline pipes,— it being claimed by some that it was quickly dissolved by the gasoline, so as not to be permanent; by others, that it was the usual and most effective application to those joints.

At the request of the defendant, a special verdict was taken, the questions in which material to the discussion are: "*Sixth.* Was the explosion caused by a leakage in the pipes, or from the careless handling of the burner or its attachments, connected with such embossing machine, by the plaintiff or by Charles Wolf? *A.* Caused by leakage of the pipes. *Seventh.*

Was the accumulation of gas which exploded below the floor of the building or in the room where the embossing machines were situated? *A.* On both places." "*Eleventh.* Were the pipes or connections used for conveying the gasoline to be generated into gas so defective, at the time of the accident, as to permit the escape of gasoline? *A.* Yes. *Twelfth.* If you shall answer the eleventh question in the affirmative, then where was such defect, and what was the character of such defect? *A.* Imperfect connection caused a leakage under the floor." "*Fifteenth.* Was the defendant guilty of negligence which was the natural and probable cause of the accident, and which accident, in the light of the attending circumstances, ought reasonably to have been foreseen by a person of ordinary intelligence, care, and prudence as likely to occur? *A.* Yes."

The defendant moved for a nonsuit at the close of the plaintiff's case, and for direction of a verdict in its favor at the end of the trial, and after verdict moved to set aside the same and grant a new trial for want of evidence, among other grounds, and to set aside the answers to the above-mentioned questions, among others, and render judgment in favor of the defendant. All of the motions being overruled, judgment was entered for the plaintiff, from which this appeal is taken.

For the appellant there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter.* They argued, among other things, that where the evidence leaves the actual cause of an accident in doubt the plaintiff cannot recover. *Hyer v. Janesville*, 101 Wis. 377; *Spencer v. C., M. & St. P. R. Co.* 105 Wis. 311; *Dacey v. N. Y., N. H. & H. R. Co.* 168 Mass. 479; *Hickey v. C., M. & St. P. R. Co.* 64 Wis. 649; *Louisville G. Co. v. Kaufman*, 48 S. W. Rep. 434, 10 Am. & Eng. Corp. Cas. (N. S.), 161; *Epperson v. Postal T. C. Co.* 155 Mo. 346; *Murphy v. B. & A. R. Co.* 167 Mass. 64; *Dewhirst v. B. & M. R. Co.* 167 Mass. 402; *Ames v. N.*

J. S. R. Co. 46 Atl. Rep. 701; *Kenneson v. West End St. R. Co.* 168 Mass. 1; *Corcoran v. B. & A. R. Co.* 133 Mass. 507; *Deschenes v. C. & M. R. Co.* 69 N. H. 285.

For the respondent there was a brief by *W. J. & J. H. Turner*, and oral argument by *W. J. Turner*. They contended, *inter alia*, that it was the duty of the defendant to provide a safe place and safe appliances for the plaintiff to work. Hamilton, Negligence, 237. For cases of liability for injuries received on account of the escape of gas by reason of defects in the pipe, see *Smith v. Boston G. L. Co.* 129 Mass. 318; *Richmond G. Co. v. Baker*, 36 L. R. A. 683; *Jamieson v. Indiana N. G. & O. Co.* 128 Ind. 555; *Louisville G. Co. v. Gutenkuntz*, 82 Ky. 432; *Citizens' G. L. & H. Co. v. O'Brien*, 118 Ill. 174; *Blakie v. Brookline G. L. Co.* 167 Mass. 150; *Ohio G. F. Co. v. Andrews*, 29 L. R. A. 337, and note. If the negligence of the defendant combined with the negligence of Wolf caused the injury to the plaintiff, the defendant is liable in this action. *Sherman v. Menominee River L. Co.* 72 Wis. 122; *McClure v. Sparta*, 84 Wis. 269; *Cowan v. C., M. & St. P. R. Co.* 80 Wis. 284; Beach, Contributory Negligence (2d ed.), § 304; *Stringham v. Stewart*, 100 N. Y. 516; 7 Am. & Eng. Ency. of Law (1st ed.), 828; 1 Bailey, Master & S. §§ 982, 984.

DODGE, J. The first and principally argued contention is that there was no evidence from which could have been reached a finding of negligence on the part of the defendant proximately causing the explosion in question. The plaintiff's theory, and that upon which alone the verdict in this case rests, is that a leak existed in the pipes under the floor, from which enough gasoline escaped to supply vapor to fill the basement and make its way upward through the interstices in the floor, and to mix with the air in the required proportion to form an explosive compound in the embossing room. There is certainly no direct evidence

to establish this theory, unless the very fact of explosion necessitates such conclusion. There is no evidence that there was any leak in the basement. True, the looseness of the vertical pipe in its joint below the floor might have resulted in a leak, and the air gauge indicated an unusual escape somewhere in the pipe system, but the facts disclosed negative the conclusion that any leak at the loose joint was responsible for falling pressure on the air gauge; for when that joint was tightened — and, according to the undisputed evidence, it was completely tightened, at least temporarily — the pressure gauge continued to fall as before. On the other hand, the later investigation did discover a leak about the union connection with the tank outside, which accounted for the conduct of the pressure gauge. Not only was there absence of affirmative proof of any escape of gasoline in the basement, but the theory of a volume of either inflammable or explosive gas existing there was negatived beyond controversy by the physical fact that neither explosion nor combustion there took place. The same interstices through which the gas must have made its way from the basement to the floor above, upon the plaintiff's theory, would inevitably have carried the flame from the floor above to the gas below, and caused either explosion, if the proportion of gas to air was small enough, or combustion of great violence. This physical fact of absence of explosion or combustion below the floor is such as human testimony, opinion, or theorizing cannot overcome (*Cawley v. La Crosse City R. Co.* 101 Wis. 145), and of itself is sufficient to defeat the plaintiff's theory submitted to the jury by the sixth interrogatory and adopted by them.

Apart from this complete negation of the theory of escape of gas from a defect in the pipes under the floor, the question whether such escape was responsible for the explosion and plaintiff's injury was so without evidence to support an affirmative answer that it should not have been submitted

to the jury. If, indeed, it had appeared that presence of gas in the room where the embossing machines were, such as to cause this explosion, could not have existed, or, perhaps, ordinarily would not have existed, but for some defect in the apparatus which ordinary care could have guarded against, the jury might have been justified in ascribing the plaintiff's injury to the defendant's negligence, upon the doctrine of *Cummings v. National F. Co.* 60 Wis. 612; and *Carroll v. C., B. & N. R. Co.* 99 Wis. 399. That doctrine is that where both the apparatus and the operation of it are in the control of the defendant, and the accident is one which ordinarily could not happen except by reason either of defect in the apparatus or negligence in its operation, a presumption of one or the other arises sufficiently from the happening of the accident to justify a verdict against the defendant. But in this case, by uncontradicted evidence, it is established that there was another and entirely adequate cause which might have accounted for the presence of the explosive gas, namely, the habit of the co-employee Wolf to permit a slight flow of gasoline from his burner after it was extinguished. This gasoline, dripping from the end of the burner upon the heated iron, would, of course, be vaporized with great rapidity, and there is uncontradicted testimony that enough gas might thus be formed in half an hour to fully account for the explosion. Considerably more than that time is shown to have elapsed with the burners extinguished, after the plaintiff and Wolf commenced work, and before the catastrophe. Were the explosion thus caused it would most clearly be due, not to the ordinary dangers of the operation of the apparatus properly handled, but to the negligence of a co-employee of the plaintiff, from which, of course, liability could not result against the common employer. *Dahlke v. Illinois S. Co.* 100 Wis. 431; *Portance v. Lehigh Valley C. Co.* 101 Wis. 574.

With these two possible causes to account for the explo-

sion, the burden of proof, of course, rested on the plaintiff to prove the one for which the defendant would be liable. It did not suffice that one might be as probable as the other. It was not the situation of two possible causes, one or the other of which the jury *must* adopt, and, if they did not find Wolf's negligence established, must therefore assume the hypothesis of a defect. The existence and proximate efficacy of the defect was required to be established by reasonably direct proof, while only the reasonable *possibility* of causation by Wolf's negligence need be proved to prevent presumption of a defect being necessarily drawn from the accident itself. That possibility, as already stated, was proved without controversy. The sixth question, however, submits the two causes to the jury, for adoption of one or the other, as if they stood on an entire parity as to *quantum* of proof necessary to give either its legal effect. This was erroneous. The real jury question, had there been any evidence to justify it, would have been whether the jury found a preponderance of reasonably direct evidence that leakage from the pipes caused the explosion, in view of the established possibility that it might have resulted from Wolf's negligence. That no such evidence existed was, however, entirely clear. The only attempted proof was the testimony of the chemical expert Prentice that "it is possible" for enough gas to make its way upward through such interstices in the floor to cause the explosion. On cross-examination, he said he had no idea of the time necessary; assumed a reasonable time; not a hundred years; had no idea of the quantity of gasoline necessary to create gas enough to fill the cellar. The defendant's expert chemist, Fisher, testified, without contradiction, that at least twelve hours would be necessary for the process of diffusion, and that a pint of gasoline produces about three and one-half cubic feet of gas, so that something like twenty gallons of gasoline must be evaporated to fill the space below the floor, without allowing for the very considerable outflow

through the cellar window. It was shown positively that no wastage of gasoline, certainly more than a few quarts, could have occurred. Thus, even the "possibility," in form testified to by Prentice, became an impossibility, in view of the known circumstances.

But, conceding the possibility that either such defect or negligence of Wolf was the efficient cause, choice between them could only have been based upon conjecture or guess. There was absolutely no evidence even tending to prove that the gas which exploded came from the basement and not from Wolf's burner. The submission to a jury of such choice has been universally condemned, and by no court more vigorously than by this. It is not consistent with the courageous assumption of responsibility and performance of judicial duty which litigants have a right to expect of trial courts. *Berlick v. Ashland S. & F. Co.* 93 Wis. 437, 445. If there is no reasonably direct evidence to establish the proximate efficacy of the cause alleged, the court should so decide, and should not, by submitting it to the jury, imply that the question is an open one. The present case is a forcible illustration of the burdens cast on litigants by the opposite course. Already the expense of two long and burdensome trials and of an appeal to this court has fallen upon each of the parties, whereof a very large part would have been saved by a definite ruling, as soon as the evidence was in, that the plaintiff had not shown, by any reasonably direct evidence, that defendant had been guilty of negligence which caused his injuries. This subject received exposition in clear and incisive language, and with full citation of authority, by MARSHALL, J., in *Hyer v. Janesville*, 101 Wis. 371, 377; which case was followed in *Gagan v. Janesville*, 106 Wis. 662, where we said: "The plaintiff must show by reasonably direct evidence that the defect, and not something else, caused the injury." See, further, *Hickey v. C., M. & St. P. R. Co.* 64 Wis. 649; *Spencer v. C., M. & St.*

P. R. Co. 105 Wis. 311; *Louisville Gas Co. v. Kaufman*, 48 S. W. Rep. 434.

The danger of a miscarriage of justice and of a verdict in favor of the suffering plaintiff without evidence to support it was enhanced in this case by the charge, which is in direct disobedience of the rule so recently elaborated, that where a special verdict is taken it is not only improper but erroneous to instruct the jury generally upon the law of the case and, especially, so as to give them information of the legal effect of the answers to the special questions submitted. *Kohler v. West Side R. Co.* 99 Wis. 33; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 318; *Fox v. Martin*, 104 Wis. 581–587; *New Home S. M. Co. v. Simon*, 104 Wis. 120. In this case, where seventeen questions were submitted to the jury going largely into the detail of facts, we find no instruction which is expressly addressed to any one of those questions, but, on the contrary, an exhaustive charge as to the law governing the employer's responsibility, indicating fully what circumstances would result in imposing and what in excusing from liability. Especially as bearing upon the consideration of the sixth question above discussed, we find the jury informed: "If you should determine from the evidence that the injury to the plaintiff was caused by the negligence of Charles Wolf in and about his employment in operating an embossing machine in the same room in which the plaintiff was at work, and further determine from the evidence that the defendant exercised reasonable care and diligence in employing said Wolf, *then the defendant would not be liable for the injury complained of.*" This instruction clearly notified to the jury that if in this field of conjecture, where, as already pointed out, there was no direct evidence to compel them, however conscientious, to say that one cause was proved rather than the other, they adopted the second alternative, namely, the careless handling of the burner by Wolf, they left the in-

jured plaintiff without remedy for his suffering, while, if they adopted the other theory, they shifted onto the defendant employer the burden of compensating him pecuniarily therefor. A jury can hardly be blamed, under such circumstances, for preferring and adopting that guess towards which their human sympathies impel them. Other instances of the same vice in the charge might be pointed out, but, as the subject has been so fully treated in the later cases above cited (which, by the way, have emanated from this court since the trial of the present case), and as the views we have expressed upon the merits of the controversy are conclusive of the appeal before us, it is not deemed necessary to enter upon a discussion of them. The giving of such instructions was an error for which the judgment should be reversed, but which is overshadowed by the predominant mistake of treating the case as if there were any evidence on which a jury might have held the defendant liable.

Other errors, going principally to the detail of the trial, are assigned but only perfunctorily argued, and, for the reason just above mentioned, we deem it unnecessary to discuss or decide whether they are well assigned. It is clear, for the reasons above stated, that error was committed in refusing to direct a verdict for the defendant and in refusing to set aside the answers, certainly to the sixth, seventh, twelfth, and fifteenth questions, for which error the judgment must be reversed.

By the Court.— Judgment reversed, and cause remanded for new trial.

WEILLE, Respondent, vs. REINHARD, Appellant.

October 15 — October 30, 1900.

Practice: Issues: Evidence: Settlement of accounts.

1. After the commencement of an action upon an open account the defendant therein brought an action to foreclose a mortgage executed to him by the plaintiff and not put in issue by the pleadings in the former action. On the trial of the former action, while the foreclosure action was still pending and undetermined, the mortgagor was allowed to give evidence tending to prove that the note secured by the mortgage had been fully paid and satisfied. *Held*, improper.
2. In an action upon an account which extended over a considerable number of years, the evidence is *held* to show — contrary to a referee's finding, confirmed by the trial court—that during that period there had been at least one complete settlement of the accounts between the parties.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *George W. Sloan*, and for the respondent on that of *J. E. Malone.*

CASSODAY, C. J. This action was commenced July 26, 1894, to recover $500, alleged to be for and on account of money had and received by the defendant from the plaintiff at divers times between July 26, 1874, and July 26, 1894, and which was due and payable on account, but which the defendant had failed to pay, though often requested so to do; and the complaint was amended upon the trial so as to include the time between 1869 and 1874. The defendant answered by way of a general denial and a counterclaim for a balance of $3.58, found due to the defendant on settlement of their respective accounts, February 23, 1892. The plaintiff replied to the counterclaim by way of a general

denial. Thereupon, and in pursuance of the stipulation of the parties, the cause was referred to John A. Barney to hear, try, and determine.

A trial being had before the referee, he reported to the court his findings of fact and conclusions of law to the effect that from February 26, 1874, to July 26, 1894, there were mutual and open accounts current between the parties to this action; that such mutual accounts contained one item consisting of a note and mortgage bearing date February 29, 1876, on which an action was commenced September 6, 1894, by the defendant against the plaintiff, which action was still pending and undetermined; that such note and mortgage had been fully paid and ought to be satisfied of record; that, in addition to the payment of such note and mortgage on such mutual and open account there was owing to the plaintiff by the defendant $402.93, with interest thereon from July 26, 1894. And as conclusions of law the referee found, in effect, that such note and mortgage had been fully paid and ought to be satisfied of record; that, in addition to the payment of such note and mortgage on such mutual and open account, there was owing to the plaintiff by the defendant $402.93, with interest from July 26, 1894, and that the plaintiff was entitled to judgment accordingly.

On application to confirm such report the court, January 4, 1897, referred the same back to the referee for compliance with the statute in such cases. Sec. 2865, Stats. 1898. On November 11, 1897, the referee made a new report of his findings of fact and conclusions of law to the effect that there were mutual and open accounts current between the parties from February 26, 1874, to July 26, 1894, which had never been settled; that such note and mortgage was an item of such account; that September 6, 1894, an action to foreclose such note and mortgage was commenced, and was still pending and undetermined; that there had been five payments of interests made on that note and mortgage, and,

in addition thereto, eight several payments on the principal, aggregating $327.90; that, in addition, the plaintiff had performed labor for the defendant in six of the years mentioned, amounting in the aggregate to $265.78, and also paid cash to the defendant in eleven of the years mentioned in the aggregate amount of $978.88, making in all $1,244.66; that, during the last twenty years mentioned, the defendant had sold and delivered to the plaintiff goods, wares, and merchandise, flour, wood, and pasture, to the amount in the aggregate of $526.67, and, in addition, had paid to the plaintiff several items of cash to the aggregate amount of $264.90, making in all $791.57,—leaving a balance in favor of the plaintiff and against the defendant of $452.64. And as conclusions of law the referee found, in effect, that the note and mortgage had been fully paid and satisfied, and that, in addition, the plaintiff was entitled to judgment against the defendant for $452.64, with interest thereon from July 26, 1894.

The court, having in all things fully confirmed such report, and ordered judgment for the plaintiff in accordance therewith, and costs, such judgment was thereupon entered accordingly. From that judgment the defendant appeals.

The trial of this cause, as disclosed in the record, is anomalous in several respects. The action is for money had and received during a period of twenty-five years. No other cause of action is alleged. The plaintiff recovered $265.78 for labor performed during six of the years prior to 1887 and including 1874. The plaintiff was allowed to give evidence tending to prove that the note and mortgage executed by him to the defendant February 29, 1876, for $327.90, and which was not put in issue by the pleadings, had been fully paid and satisfied, notwithstanding an action was then pending and undetermined to foreclose that note and mortgage. Upon what principle of law the subject matter of the foreclosure action was imported into this action we are unable

to perceive. We must hold that that note and mortgage were improperly brought into this action.

The report of the referee, thus confirmed, found as matter of fact not only that there were mutual and open accounts current between the parties from February 26, 1874, to July 26, 1894, but also found that there never had been any settlement between them. The evidence is overwhelming to the effect that February 29, 1876, the plaintiff was indebted to the firm of Lembgen & Reinhard — composed of this defendant and another, which on that day dissolved, upon balancing and settling accounts — in the sum of $327.90; and that the note and mortgage in question were then given to secure the payment of such balance. The plaintiff admits that he was then indebted for $300 for groceries, and that he gave the note and mortgage for $327.90 for groceries. It is idle to claim that there was no settlement at that time, and yet the findings include items prior to that time. The defendant was a merchant, and kept books, in which appear to have been entered the dealings and accounts between the parties. The evidence is strong tending to prove that the parties adjusted their accounts from time to time, and struck a balance, and settled the same by note or due-bill. Particularly is this so as to the settlement which the defendant claims to have been made on or about April 22, 1885. It appears that about that time the plaintiff received from the government two checks for back pay for pension to the amount of $457.87, and that the plaintiff indorsed the checks, and delivered them to the defendant, who, on April 20, 1885, drew the money on the checks from the First National Bank of Beaver Dam. So much is conceded. The plaintiff testified that there was another check for $42, making in all $499.87. The finding is that on that day the defendant received of the plaintiff $499.87. That is the only money found to have passed between the parties on that day, or at any time in that April, except that it is found that the

plaintiff paid to the defendant on that day $104.01, and also except that it is found that the defendant paid to the plaintiff $25 on April 23, 1885. And yet it appears beyond reasonable controversy that on April 23, 1885, the defendant gave to the plaintiff a memorandum or duebill, of which the following is a copy: "$400. Lowell, Wis., April 23, 1885. Deposit by *Ch. Weille*, four hundred dollars, *being balance on draft. Philip Reinhard;*" that May 21, 1885, the defendant paid to the plaintiff on that duebill $110, which was on that day indorsed thereon; that June 17, 1885, the defendant paid to the plaintiff on that duebill $200, which was on that day indorsed thereon; that June 27, 1885, the defendant paid to the plaintiff $100; and thereupon the defendant took up the duebill which the plaintiff held against him. The finding is that the defendant paid the $110, but that he did not pay the $200, nor the $100. The pretense is that such payments were made to somebody else. But it is undisputed that the duebill was taken up. The defendant flatly denies having received of the plaintiff any pension check of $42. Thus it appears that the $499.87, for which the defendant was held to be liable, is without evidence to support it. The evidence on the part of the defendant pretty clearly shows that April 22, 1885, the parties settled their accounts, and that there was then allowed to the plaintiff for work $81.27, and that he paid to the defendant the balance on the defendant's books against him of $104.01, and so the books were balanced. Several matters entered into the settlement. While it does not clearly appear whether the $104.01 was wholly or in part paid by way of the pension checks, yet it seems to be conceded that it was paid; and that amount, as well as the $81.27, was allowed in the findings. The making of the settlement is confirmed by the giving of the duebill for the "balance on draft" or checks. It is, moreover, admitted by the plaintiff, in effect, that at that time he went to the defendant's to settle up with him;

that they then settled his account for labor of $81.27; that he never had exactly that amount for labor at any other time; that they settled the book account at that time; and, while he evades the question as to whether the defendant's account against him on the books amounted to $104.01, yet he nowhere denies that that was the amount of the balance, and finally admits that such balance was settled and paid; and that was the amount allowed in the finding. We are convinced that there was a complete settlement of all matters outside of the note and mortgage at that time. There is strong evidence of subsequent settlements, but, as the evidence in that regard is more or less vague and confused, we are not disposed to act further as referees in this action.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial as to all matters subsequent to the settlement of April, 1885, and not herein determined.

THE STATE EX REL. FULLER and another vs. THE CIRCUIT COURT FOR WAUKESHA COUNTY.

October 15 — October 30, 1900.

Appealable order: Certiorari: *Vacating judgment at subsequent term: Foreclosure of mortgages: Notice of* lis pendens.

1. An order setting aside a foreclosure judgment because notice of *lis pendens* had not been duly filed, but not granting a new trial, is not appealable under subd. 2 or subd. 3, sec. 3069, Stats. 1898; and if the court had no power to make such order its action may be reviewed on *certiorari.*
2. A judgment of foreclosure of a mortgage, entered without compliance with the requirement of sec. 3187, Stats. 1898, that a notice of *lis pendens* shall be filed twenty days before judgment, is irregular but not void, and the court has no power to set it aside, because of such irregularity, at a subsequent term.

CERTIORARI to review an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed.*

In 1898 the relators commenced an action in the circuit court for Waukesha county to foreclose a mortgage given by one Mary E. Walsh. The complaint was filed in the clerk's office on August 13, 1898, and the notice of *lis pendens* was filed with the register of deeds on the same day. The defendant being in default, judgment of foreclosure was duly entered on September 2, 1898. A sale thereunder was duly made November 11, 1899, and confirmed December 16, 1899. On January 9, 1900, the defendant in that action obtained an order to show cause why said judgment and sale should not be set aside, based upon an affidavit of her attorney, alleging certain irregularities, but principally that the notice of *lis pendens* had not been filed twenty days before judgment. On the 24th day of January, 1900, the court made an order setting aside said foreclosure sale and vacating the judgment. No answer was tendered and no claim was made as to any defense on the merits. The term at which the foreclosure judgment was entered expired December 5, 1898. On February 24, 1900, a writ of *certiorari* was issued by this court to the circuit court for Waukesha county, commanding that said court certify the record and proceedings in said action to this court for review. Due return thereto was made, from which the facts above stated are taken.

For the relators there was a brief by *Nath. Pereles & Sons*, and oral argument by *C. F. Hunter.*

For the defendant there was a brief by *Ryan & Merton*, and oral argument by *E. Merton.*

BARDEEN, J. One reason urged why the writ herein should be quashed is that the plaintiffs have an adequate remedy by appeal, under subd. 2, sec. 3069, Stats. 1898. What is said by the court in *Ledebuhr v. Grand Grove W. O. D.* 97 Wis.

341, is a sufficient answer to that contention. The order is not appealable under subd. 3, because no application was made to set aside the defendant's default, and no new trial was granted. There being no adequate remedy in this direction open to the parties, there is no perceivable reason why the action of the circuit court may not be reviewed in this proceeding, if it be determined that it proceeded without jurisdiction or authority. We need not enter into any discussion of the power of this court to review the action of the court below in a proper case. That has been settled in a long line of cases mentioned in *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591.

The foreclosure judgment that was set aside was entered September 2, 1898. The term at which it was entered expired on December 5, 1898. The order vacating the judgment was made January 24, 1900, more than one year after the term had ended. Sec. 3187, Stats. 1898, requires that a notice of *lis pendens*, in an action to foreclose a mortgage, shall be filed in the office of the register of deeds of the proper county, "twenty days before judgment." In *Manning v. McClurg*, 14 Wis. 350, it was held that the omission to file such notice was an irregularity sufficient to cause a reversal of the judgment, but did not render it void. Such, also, would be the effect on a judgment entered before the notice had been on file for the term required by the statute. In *McBride v. Wright*, 75 Wis. 306, the judgment was entered without proof of the filing of the notice. At a subsequent term, and nearly a year after the judgment was entered, the defendant moved to vacate the judgment, and appealed to this court from the order denying such motion. The rule in *Manning v. McClurg* was affirmed, and the court further said that, the application to vacate having been made at a term subsequent to that at which the judgment was rendered, the court had no power to vacate it. Again, in *Huntington v. Meyer*, 92 Wis. 557, it was held that, although

such notice was not filed, the court had jurisdiction to enter judgment, and it could not be treated as a nullity. It was irregular, but not void. The law was early announced by this court to be that, as to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of the judgment, it has no power to alter or change at a subsequent term. *Ætna L. Ins. Co. v. McCormick*, 20 Wis. 265. Later cases on the same subject and to the same effect are noted in *Milwaukee M. L. & B. Soc. v. Jagodzinski*, 84 Wis. 35; *Day v. Mertlock*, 87 Wis. 577; *Bassett v. Bassett*, 99 Wis. 344. See, also, *Packard v. Kinzie Ave. H. Co.* 105 Wis. 323, in which the discussion as to what mistakes or errors may be corrected by the court at a subsequent term is quite pertinent to the contention of the defendant in this case.

Now, if it be conceded that the notice of *lis pendens* in this case had not been on file for the period of twenty days before judgment was entered (a question we do not decide), it is evident, from the authorities cited, that the court was absolutely without power or authority to vacate or set aside its judgment at a subsequent term. The judgment was simply irregular. If there was error in it, it was error committed by the court. After the term expired no power existed in the court to correct it. Counsel for defendant refer us to the case of *Gile v. Colby*, 92 Wis. 620, as furnishing some justification for the course they pursued. It is true that the writer of the opinion in that case suggests that it would be better practice to have made application to the trial court for the correction of the error before taking an appeal. In view of the fact that the power of the court to disturb judgments at a subsequent term had been denied in so many cases, they ought not to have been misled by the inadvertent suggestion contained in that case, for it is no more than a suggestion. It is perfectly evident that the writer did not have in mind the disability under which the court labors

after the term has ended as to such matters, and that there was no intention of overturning a rule of law so firmly established as the one in question.

By the Court.— The order of the circuit court setting aside the foreclosure sale and vacating the judgment is reversed.

LYLE, Respondent, vs. MCCORMICK HARVESTING MACHINE COMPANY, Appellant.

108	81
111	[1] 9
108	81
117	[7] 42

October 15 — October 30, 1900.

Promissory notes: Agreement to return to maker: Breach: Damages: Insolvency of maker: Special verdict: Instructions to jury.

1. For breach of a contract to return a promissory note to the maker upon demand there may be a recovery of actual damages, although the maker has not paid the note.
2. If, in such a case, the note has been transferred to a *bona fide* holder, the damage to the maker is the continued existence of his liability thereon, and the measure of his recovery would be the value of the note, where no special damage is shown.
3. *Learned v. Bishop*, 42 Wis. 470, and *Selleck v. Griswold*, 57 Wis. 291, distinguished.
4. The fact that the maker of the note, in such a case, is insolvent or "execution proof" does not necessarily render the note valueless or preclude damage to him from the existence of the liability. At most, his financial condition is a circumstance to be considered in assessing the damages.
5. The jury having been instructed, in such a case, that the measure of damages was the actual value of the note, and that plaintiff's solvency was an element to be considered in ascertaining the amount, it was not error to refuse to submit in the special verdict a question as to whether judgment against plaintiff on the note could be collected on execution.
6. Where a special verdict is to be rendered, general rules of law governing the rights of parties should not be given to the jury in the

charge so as to inform them of the effect of their answers to the questions submitted; but general instructions as to the weight of evidence, burden of proof, and the conduct of the jury generally, are proper.

7. The refusal to give an instruction which is in part improper is not error, since under sec. 2853, Stats. 1898, it must be given without change, as requested, or refused in full.

8. Where a question in a special verdict is in itself so clear and unambiguous as not to require any explanatory or qualifying charge, the omission or refusal to give an instruction of that nature is not a prejudicial error, even though the instruction was a proper one.

APPEAL from a judgment of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

The following facts are alleged by the complaint, and substantially found to exist by a special verdict had after trial, to wit:

The plaintiff, on January 3, 1898, purchased from the defendant a corn husker, a sale of which in the previous year had, by consent, been rescinded, and on that day gave therefor his negotiable note for $150, due December 1, 1898, under a contract signed by both parties, whereby the defendant agreed to fix the husker in first-class shape, "make the same do good work, and satisfactory to the average witness for whom *W. J. Lyle* may husk corn in 1898; the machine subject to one day's trial. If the company fail to comply with any part of this agreement, *Lyle* can return the machine to Fox Lake, and his notes will be returned," etc. Plaintiff notified defendant of his desire to start the machine on January 21st, and called on them to make it work. Their duly authorized agent attended at the time, but went away without starting the machine, as he claims, by consent of plaintiff, but, as plaintiff claims, without such consent. The jury found with the plaintiff. Thereafter, on March 23d, the plaintiff returned the machine to Fox Lake, notified defendant of the fact, and then, or on April 14, 1898, demanded return of his note, which was refused. It also appeared that

before commencing this suit the note had been transferred to an innocent third party, for value, and by him sued and put in judgment against the plaintiff in the sum of $166.20, of date February 7, 1899, which the plaintiff had not paid. There was some evidence of plaintiff's own declarations, made before suit upon the note, that he was execution proof. Whether the negotiation of the note preceded or followed plaintiff's demand for its delivery did not appear.

The only questions of the special verdict involved in the errors assigned are the sixth: "Did the plaintiff consent, expressly or impliedly, to postpone the fixing and testing of the machine, or that it need not be done on January 21, 1898?" answered, "No;" and fifteenth: "At what sum do you assess plaintiff's damages?" answered, "$150."

Motion for nonsuit was made at the close of the plaintiff's case, and motion to direct a verdict for the defendant at the close of all the testimony, for the reason, amongst others, that the plaintiff had failed to prove any damages. Defendant also requested instruction that only nominal damages could be awarded. Such motions being overruled, defendant requested submission of the question: "Could the judgment obtained by J. H. Weber against the plaintiff upon his note, which has not been paid, be collected upon execution?" which request was refused. Plaintiff also requested an instruction as follows: "I instruct you that it is immaterial whether plaintiff or defendant first suggested that the machine should not be tried or tested on January 21, 1898, by Mr. Jones. If the plaintiff agreed or consented, expressly or impliedly, by word or act, that the machine need not be tried at that time, then your answer to the sixth question must be in the affirmative." That also was refused.

From a judgment for plaintiff upon the verdict for the sum of $150, interest, and costs, the defendant appeals.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles*. They con-

tended, *inter alia*, that an action for a breach of a covenant against damage because of liability cannot be maintained without allegation and proof of loss or injury. It is not sufficient that a judgment has been entered. *The judgment must be paid.* In this case it is admitted that no payment has been made and that no loss or injury has been proven. *Selleck v. Griswold*, 57 Wis. 291; *Taylor v. Coon*, 79 Wis. 77; *Maloney v. Nelson*, 144 N. Y. 182; *Aberdeen v. Blackmar*, 6 Hill, 324; *Learned v. Bishop*, 42 Wis. 470; *Thompson v. Taylor*, 30 Wis. 68. In an action for the *conversion* of the note of a third party there might be a recovery of the actual value of the note; but this action does not sound in tort, and there could be no recovery beyond nominal damages, it appearing that plaintiff has suffered no money loss, and that the judgment entered upon the note could not be collected. *Gaylor v. Hunt*, 23 Ohio St. 261; *Freeman v. Venner*, 120 Mass. 426.

For the respondent the cause was submitted on the brief of *North & Lindley*, attorneys, and *M. L. Lueck*, of counsel. They argued, among other things, that the true measure of damages is the amount due on the note, irrespective of plaintiff's failure to pay the same, or his solvency or insolvency. The gravamen of this action is the wrongful act of the defendant in refusing to return the note and causing a note without value, except to a *bona fide* holder, to become valuable by the sale and transfer thereof to a purchaser against whom the defenses to the same could not be urged. *Decker v. Mathews*, 12 N. Y. 313; *Metropolitan E. R. Co. v. Kneeland*, 120 N. Y. 134; 3 Sutherland, Damages (2d ed.), 2442; *Winona v. Minn. R. C. Co.* 29 Minn. 68.

Dodge, J. 1. The first, second, and third assignments of error naturally fall together for the purposes of discussion. They present the question whether plaintiff has shown himself entitled to any damages, and, if so, to what amount.

These questions were raised by the motion for nonsuit and for direction of verdict and for an instruction to allow only nominal damages for the reason that no actual damages had been proved. Appellant's position is predicated upon the propositions: (1) That the action is not in tort, for the reason that the disposal of the note by the defendant is not alleged to have been wrongful, and that it is neither alleged nor proved that the note was in its possession or control at the time when plaintiff's contract right to and demand for its delivery came; therefore no conversion or other wrong could be committed by refusing its delivery. (2) That, being an action on contract, it falls within the class of those where the contract is substantially one of indemnity, and in this case is to be construed as indemnity only against the damage resulting from liability on the note, and therefore cannot be maintained until damage has been actually suffered by the compulsory payment of the note or the judgment thereon. (3) That, defendant being insolvent, the note has no value, and liability thereon occasions him no damage.

In the view we have taken of the other propositions, the first need not be authoritatively decided. It is urged in response thereto that, although no tort may have been committed at the time of refusing plaintiff's demand, still the defendant was under a duty to retain the note within its control so as to enable its delivery in case the plaintiff demanded it, and that its disposal thereof even before demand was in breach of that duty to the plaintiff, and therefore a conversion. In either event the measure of damage would be the value of the note *prima facie*, there being no special damages alleged. Such value, of course, might involve consideration of plaintiff's financial condition, and perhaps other circumstances.

The second proposition presents an interesting and somewhat novel question, upon which no entirely direct authority has been cited, and little has resulted from our own re-

search. The principle is well recognized that, in case of an agreement to indemnify, ordinarily the construction of indemnity against damage only will be adopted, rather than indemnity against mere liability. This proposition is decided in *Thompson v. Taylor*, 30 Wis. 68, 72, and *Taylor v. Coon*, 79 Wis. 83, while the enforceability of a contract of indemnity clearly against liability alone is established by *Smith v. C. & N. W. R. Co.* 18 Wis. 17, 24. This contract before us, however, on its face is not a contract of indemnity. It is a plain and simple contract, under the circumstances shown to exist, to deliver up plaintiff's note upon demand. That demand being made, and not complied with, a distinct and complete breach of defendant's contract was committed, and no reason is apparent why the plaintiff should not have a right to maintain an action upon such breach for whatever damages he has suffered. The measure of damages in an action for the breach of a contract is, of course, contractual. It is that which the defendant, either expressly or impliedly, has agreed to pay upon nonfulfilment of his stipulation. Where there is no express agreement as to what those damages shall be, the law raises the implication that they shall be compensation for what the plaintiff suffers *by reason of the breach*, so far as reasonably to be contemplated by the parties at the time of contracting. Analyzing the situation in the light of that principle, obviously the damage which fell upon the plaintiff in this case by reason of noncompliance with the agreement to deliver up his note was the continued existence against him of a liability thereon; a liability the very existence of which was a breach of his right. The question, therefore, for trial was, What would compensate him for that liability? It cannot be said that the damage which he suffered by defendant's breach of its contract could only be what he might at some future time have to pay, for that would not be the damage falling upon him at the time of and by reason of the breach. That would result

from various subsequent circumstances. If the note were in the hands of the defendant, overdue, so that a perfect defense thereto might be made, he might ultimately have to pay nothing, or only the expenses of defense, while under other circumstances he might be put to expense and pecuniary loss much greater than the amount of the note.

In *Barth v. Graf*, 101 Wis. 27, 40, this general subject was considerably discussed, and the language of CHURCH, C. J., from *Kohler v. Matlage*, 72 N. Y. 259, was quoted with approval, as follows: "It is settled that upon an obligation to do a particular thing, or to pay a debt for which the covenantee is liable, or to indemnify against liability, the right of action is complete on the defendant's failure to do the particular thing he agreed to perform, or to pay the debt, or discharge the liability." This language was used in a case where a retiring partner gave bond to his copartners to pay on a day fixed certain debts for which all were liable. On his failure so to do, the obligees were held to have a complete cause of action for the amount of those debts; the court saying that, if there had been merely a bond to indemnify against damage by reason of those debts, no cause of action would have existed until they had actually paid them. This view was also taken in *Loosemore v. Radford*, 9 Mees. & W. 657, in which case the defendant, a debtor, had agreed with the plaintiff, his surety, that he would pay the guaranteed debt by a day certain. On failure so to do, it was held that the cause of action of his surety was complete, although the latter had not been called on to pay. Numerous other authorities similar in effect may be found. *Lathrop v. Atwood*, 21 Conn. 125; *Redfield v. Haight*, 27 Conn. 31; *Gage v. Lewis*, 68 Ill. 604, 617; *Merriam v. Pine City L. Co.* 23 Minn. 314, 322; *Johnson v. Britton*, 23 Ind. 105; *Wilson v. Stilwell*, 9 Ohio St. 467; Sedgwick, Damages (8th ed.), §§ 786, 789.

The reasoning of these cases seems to us founded on sound

principle. The breach of contract by the defendant is complete, and in analogy to all other situations the plaintiff should have his right of action therefor. If the measure of his damages is still involved in some degree of uncertainty, or if possibly a recovery of the full amount of the face of the note may work injustice to the defendant, still it must be remembered that the situation results from the fault of the latter, and not of the former. The postponement of the plaintiff's recovery till he has paid, especially if he be poor or embarrassed, may subject him to serious injuries meanwhile, enhanced by his poverty. His attempts to do business or to emerge from his state of insolvency may be thwarted at every turn by the impairment of his credit from the mere existence of the liability. Any property acquired by him may be promptly sacrificed in the effort to enforce that liability, and still the debt remain unpaid, and he without remedy; and that, too, without any fault on his part save poverty. As between the two, inconvenience should fall on the guilty rather than the innocent.

The peril, suggested by defendant, that plaintiff may recover and collect judgment against defendant, and still not pay the note, was pointed out, and held not sufficient to prevent a recovery, in *Loosemore v. Radford*, 9 Mees. & W. 657, and was considered in *Johnson v. Britton*, 23 Ind. 105, where it was shown that under Code practice, where law and equity are administered by the same court, it might readily be averted by equitable counterclaim.

Two decisions of our own court are cited by appellant as in conflict with conclusions here reached, namely, *Learned v. Bishop*, 42 Wis. 470, and *Selleck v. Griswold*, 57 Wis. 291. In those cases a purchaser of real estate had assumed and agreed to pay certain incumbrances thereon. The holders of those incumbrances had thereafter demanded and taken proceedings to enforce payment of the indebtedness secured by such incumbrances against the grantors, and the latter

had sued their grantees. The court disposed of the cases on the ground that the effect of the contract assuming and agreeing to pay the debts was to constitute the purchasers of the land principal debtors, and the grantors sureties merely, whereupon they applied the familiar doctrine that the implied contract from a principal to his surety is merely to protect the latter from damage resulting to him by reason of the liability assumed, not to indemnify him against liability alone,—a principle reiterated in *Momsen v. Noyes*, 105 Wis. 565. The grounds upon which these decisions went, as well as the fact that there was no time specified at which the grantees of the land had agreed to pay these debts, we think clearly distinguish them in principle from the class of cases last before cited and from the case in hand. The case of *Learned v. Bishop* is further distinguishable by the fact that it was not an action for a breach of the contract to pay the incumbrance, but was a suit in equity to foreclose a mortgage given to secure an agreement to pay that debt and to hold the mortgagee harmless from it; and relief was refused on the ground that the only part of the contract which the mortgage secured was the indemnity clause, which would not be breached until the mortgagee suffered harm.

From what has been said it is apparent that no error was committed in refusing to hold that no damages, or only nominal damages, had been suffered, because the plaintiff was insolvent or execution proof, even if such fact conclusively appeared. A note is not necessarily entirely valueless because its maker is insolvent, or because no property subject to execution exists. Many a note has been paid notwithstanding such condition. That situation, too, would largely disappear upon recovery of judgment in plaintiff's favor which might be in reach of execution. Still less is it true, as already pointed out, that insolvency precludes damage to the maker of such a note from its existence as a liability against him. At most, plaintiff's financial condition

was a circumstance to be considered by the jury in assessing the damages. It was so treated.

2. Error is assigned for that the court refused defendant's request to submit a question for consideration: "Could the judgment obtained by J. H. Weber against the plaintiff upon his note, which has not been paid, be collected upon execution?" Defendant points out that there was evidence of declarations made by the plaintiff of his insolvency and invulnerability to execution at some previous date. The court submitted to the jury question 15, as to the amount of plaintiff's damages, and instructed them generally that the measure of damages is *prima facie* the amount due on the note, but that the defendant was at liberty to reduce this valuation or amount by showing the insolvency of the maker thereof; the measure of damages being the actual value of the note to be found from the evidence. We think no error was committed in refusing to submit this question. The special verdict should properly pass upon all the material controverted issues of the case, but ordinarily there is no propriety in going further and inviting the jury to pass upon each conflict of testimony upon evidentiary facts. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, 220; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 317. The jury were informed that the solvency or collectibility of the plaintiff was an element to be taken into consideration in ascertaining the amount of his damages. This sufficiently submitted to them the question which would have been presented by defendant's interrogatory, which at best was merely a collateral consideration in reaching a conclusion upon the real issue of the amount of the plaintiff's damage.

3. The charge is criticised as being a general one, and not merely a series of directions calculated to aid the jury in understanding and answering the several questions submitted to them, within the remarks of this court in *McDermott v. Jackson*, 102 Wis. 419; *Fox v. Martin*, 104 Wis. 581; *Rhyner*

v. Menasha, 107 Wis. 201. We are unable to discover any error in this respect prejudicial to the defendant. True, the court did not — as is very good practice — take up each question and explain to the jury its meaning and their method of consideration of it. It is due to the court, however, to say that most of the questions were so clear and unambiguous that such instruction was hardly necessary. The charge is made up of general instructions as to weight of evidence, burden of proof, and the conduct of the jury generally, more or less applicable to their consideration of every question; but we do not find it obnoxious to the criticism that general rules of law governing the rights of the parties are given to the jury therein so as to inform the latter of the effect of their answer either way to any interrogatories. *Ward v. C., M. & St. P. R. Co.* 102 Wis. 225; *New Home S. M. Co. v. Simon*, 104 Wis. 120, 126. It should also be borne in mind that no requests for specific instructions with reference to any of the questions were made by the defendant, except as hereafter discussed.

4. The sixth assignment of error is predicated upon the court's refusal to give the instruction as to the sixth question set out in the statement of facts. This instruction is open to the criticism that the only portion of it which is in any wise broader or more instructive than the question itself is obnoxious to the rule stated under the last assignment,— that instructions of a general character, such as to inform the jury of the effect of their conclusions upon the rights of the parties, should not be given. It substantially informed the jury that the rights of the parties were not to be affected by the question of who suggested that the machine should not be tried or tested on June 21st. In that respect it is improper, and under the provision of the statutes that an instruction is to be either refused or given in the exact words in which it is presented no error can be predicated upon its refusal alone. We think, also, that the question itself was

so clear and unambiguous as not to require, for the protection of either party, any qualifying charge; so that failure to caution the jury in the line suggested by appellant's request was not prejudicial, although such caution, if given, might not have been improper.

By the Court.— Judgment affirmed.

CONNELL, Appellant, vs. STARK, Respondent.

October 15 — October 30, 1900.

Surface waters: Flowing upon adjacent lands: Underdrainage.

To relieve his farm from surface water which gathered in depressions or low places thereon defendant constructed a system of underdrainage located entirely upon his own land, through which the water was discharged on his own land near a dry run, in which it flowed across the lands of intermediate proprietors to plaintiff's land. Such underdrainage enabled defendant's land to absorb and hold more of the surface waters coming upon it, and the quantity flowing from it into the dry run and upon plaintiff's land was not increased. *Held*, that plaintiff had no cause of action.

APPEAL from a judgment of the circuit court for Washington county: JAMES J. DICK, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *P. O'Meara*, attorney, and *S. A. Connell*, of counsel, and oral argument by *Mr. O'Meara.*

For the respondent there was a brief by *Barney & Kuechenmeister*, and oral argument by *S. S. Barney.*

CASSODAY, C. J. This action was commenced August 31, 1898, to compel the defendant to remove and fill up certain ditches on his land, and the tiling placed therein by him, and to restore the soil along the lines of the same to its original and natural condition, and to enjoin the defendant from

discharging surface water from his premises onto the premises of the plaintiff by means of ditches or other artificial means, and for damages. The defendant answered by way of admissions, denials, and counter allegations. The following facts appear from the record, and are undisputed, or found by the court at the close of the trial:

The plaintiff has for several years been the owner of 160 acres of land, described, lying about one third of a mile east of the Menomonee river. The natural drainage is westward towards the river, with very little fall, and no natural or artificial watercourse. The defendant has for many years been the owner of sixty acres of land, which corners on the plaintiff's farm on the southeast. The defendant's land lies considerably higher than that of the plaintiff along her south line and south thereof. For many years there has been a public highway running north and south on the east line of the plaintiff's land, and thence south along the west line of the defendant's land. For many years the lands of the respective parties have been used and occupied for agricultural purposes. All of the premises of the defendant are arable and productive land. No part thereof is or was, before being improved as hereinafter found, either swampy, wet, or marshy, except as hereinafter stated. Twenty-one acres of the defendant's land, situated on the west side thereof, has a moderate declination toward the west, and, before the construction of the artificial draws hereinafter mentioned, the surface water which escaped therefrom ran west across the highway mentioned, upon the lands of one Lambrecht, and thence, in a northwesterly direction, to the margin of the plaintiff's land, and then, in a southwesterly direction, across the lands of Lambrecht and others to the Menomonee river. Several years since, Lambrecht made an embankment or dam upon the east side of his lands where the surface water entered the same from the highway, whereby the surface water flowed upon and stood upon such highway. In consequence

thereof the supervisors of the town directed a ditch to be dug along the west side of such highway to the north for the purpose of carrying, and which did carry, such surface water north along the highway, and discharged the same, near the southeast corner of plaintiff's farm, into a natural draw or waterway, crossing the highway there from the east. Naturally such surface waters would flow thence west for a short distance along the south margin of the plaintiff's land to a point about eighty-five rods west of such highway, and thence, in a southwesterly direction, onto the land of Lambrecht, such point being the place where such surface water would reach the plaintiff's lands if allowed to flow naturally across the lands of Lambrecht.

About two years before the trial the defendant, for the purpose of improving his lands and farm, and to make his twenty-one acre tract more porous and productive, placed about 125 rods of tiling in the subsoil thereof, the same extending about thirty rods from the highway east into the same, and running along the east side of the highway upon the defendant's lands, and opening upon the lands of the defendant eighteen rods south of where such draw crosses the highway near the northwest corner of the defendant's land, the water flowing therefrom to the north, along the east side of such highway, to such draw. The effect of such underdrainage was to take the waters which would have naturally run across such highway further to the south, as stated, and thence along the west side thereof, through such ditch ordered to be constructed by the supervisors, and to discharge them at about the same point in such draw, but upon the east side, instead of the west side, of the highway; and from thence such waters flowed to the west and southwesterly, in the manner stated in both cases. The effect of such underdrainage has been and is to make the defendant's lands more porous and productive, to enable the soil to absorb and hold more of the waters which fall upon the same,

and hence to decrease the amount of surface water which would otherwise escape therefrom, so that in consequence thereof the plaintiff now receives, and will continue to receive, less surface water from the lands of the defendant than she did before such drain was constructed.

Upon the east side of the defendant's farm there is situated a depression in the land, the bottom of which is about one foot on an average below the lowest point of the boundary of the same, and the area of such depression is less than one fourth of an acre. Such depression is not, and never has been, in any manner swampy or springy, but before the surrounding land was cleared and cultivated, and before the drainage hereinafter mentioned, some surface water stood upon the same after the melting of snow in the spring, and after heavy rains at other seasons of the year, but never to exceed 2,100 barrels of water, and when there was any overflow therefrom it ran to the north and into such draw, and thence west and over the southern margin of the plaintiff's farm. About fifteen years since the defendant, for the purpose of improving his farm and to render his land more porous and productive, laid drains in the subsoil of his farm, and, among others, placed tiling into and through such depression, leading thence in a northerly direction and stopping upon the defendant's lands about eighty rods from such draw. The effect of underdrainage has been and is to make the land of the defendant more porous and productive, and to enable the soil (particularly such depression) to absorb and hold more of the surface waters which come thereon. Such depression is now tillable and productive, whereas before such underdrainage it was covered with water in the spring of the year, and hard and baked in the summer. The flow of surface water therefrom into such draw is no more, and probably less, than before such drains were placed therein. Such draw is a natural drain for a large area of land extending 175 rods east from where it crosses such high-

way, and running west from such highway three quarters of a mile, to the Menomonee river. Before such draw was artificially changed by the plaintiff's grantors, as hereinafter stated, the same only extended upon the plaintiff's land a short distance west from where it entered the same, and along the south margin thereof, to a point about eighty-five rods west of such highway, and thence went southerly over the lands of Lambrecht and others. The surface water which flows into such draw from such depression enters the same about one half a mile east of the point where the plaintiff claims she is damaged by reason of such surface water, and flows across the lands of two intermediate proprietors before it reaches the lands of the plaintiff at all.

More than twenty years since and before any of the dams, drains, or ditches hereinbefore mentioned were constructed the plaintiff's grantor constructed a deep ditch along the south side of her farm, beginning in such draw where the same entered her farm at the highway near the southeast corner thereof, and extending thence west the whole length of her farm, at the same time throwing all of the earth which was taken therefrom along the north side of the same, thereby making a dam to prevent any flow of surface water into such ditch from the north, the effect of which has been and is to change the direction of the flow of such surface water to such draw, and to prevent it from flowing off from the lands of the plaintiff at the point eighty-five rods west of such highway, and to carry the most of it along the whole length of her farm. In connection with such ditch, the plaintiff's grantor, at the same time, by an extensive system of underdrainage, has led all of the surface waters of a large part of her farm into such ditch. No act of the defendant has ever added perceptibly to the flow of surface water upon the plaintiff's land, and she has suffered no appreciable damage in consequence thereof.

As conclusions of law, the court found that the plaintiff

is not entitled to any relief in this action; that the defendant is entitled to a judgment dismissing the complaint and for his costs in this action; and ordered judgment to be entered accordingly. From the judgment so entered the plaintiff brings this appeal.

The findings seem to be well supported by the evidence. It is conceded that in the state of nature the surface water from a large portion of the defendant's lands naturally flowed across the lands of other intermediate proprietors, and from thence upon the lands of the plaintiff. The real issue tried is whether the defendant, by the system of underdrainage mentioned, unlawfully increased the flow of surface water upon the plaintiff's land, to her damage. The expert evidence is to the effect that such underdrainage made the defendant's land more porous, and therefore it more readily absorbed heavy rainfalls, and hence decreased the amount of surface water flowing from his land. The court's findings are to that effect, and hence are sustained by such expert evidence. That, of itself, would seem to be sufficient to bar the relief sought in this action.

The facts presented are broadly distinguishable from those present in the recent cases in this court wherein it was held that the plaintiff had acquired the right to have surface water flow in an artificial channel on the defendant's land by adverse user and prescription. *Wilkins v. Nicolai*, 99 Wis. 178; *Roberts v. Von Briesen*, 107 Wis. 486. Here the defendant seeks to relieve his farm from surface water being gathered in depressions and low places thereon by a system of underdrainage, located entirely on his own land, and through which such surface water is discharged on his own land, near a dry run or draw, as it is called in the findings, and in which it flows westerly for a considerable distance, to the place where it is claimed the plaintiff's lands are damaged. The contention of the plaintiff brings the case squarely within the rule of law announced by the Massachusetts

court long ago as follows: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing onto it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow." *Gannon v. Hargadon*, 10 Allen, 109. See, also, *Franklin v. Fisk*, 13 Allen, 211; *Cassidy v. O. C. R. Co.* 141 Mass. 174, 178. That rule has frequently and recently been sanctioned by this court. *O'Connor v. F. du L., A. & P. R. Co.* 52 Wis. 526, 531; *Heth v. Fond du Lac*, 63 Wis. 228, 232; *Johnson v. C., St. P., M. & O. R. Co.* 80 Wis. 641, 646; *Champion v. Crandon*, 84 Wis. 405, 409; *Clauson v. C. & N. W. R. Co.* 106 Wis. 308, 311.

Under the rule stated, there is certainly no ground for relief in this action. Besides, it is quite evident that the increased flow of surface water of which the plaintiff complains is caused wholly, or at least in part, by the ditch mentioned as being constructed by the plaintiff on the south side of her farm.

By the Court.—The judgment of the circuit court is affirmed.

For a note on rights as to flow of surface water, see *Gray v. McWilliams* (98 Cal. 157), in 21 L. R. A. 593.—REP.

Fox and others, Respondents, vs. MARTIN, Appellant.
SAME, Appellants, vs. SAME, Respondent.

108 99
117 467

October 16 — October 30, 1900.

Wills: Contest: Allowance of counsel fees out of estate: Executors: Stipulation.

1. In a contest as to the validity of a will the allowance to the parties of counsel fees to be paid out of the estate, in addition to statutory costs, is without authority of law; though upon the settlement of an executor's account he may receive credit for expenses of that nature properly incurred by him.
2. The person named as executor in a will is not an executor until he has qualified as such and been confirmed in his office.
3. If the parties to a will contest do not include all who are beneficially interested in the estate, a stipulation between them that counsel fees shall be allowed, payable out of the estate, is not binding or effective.

APPEALS from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Reversed on both appeals.*

This is a contest as to the probate of the will of W. H. Stickney, deceased. The will was admitted to probate by the county court of Waukesha county, but the decree was reversed by the circuit court upon appeal, and allowances were made by the circuit court for counsel fees payable out of the estate to both parties. The judgment of the circuit court was reversed by this court upon appeal. 104 Wis. 581. Upon the filing of the *remittitur* of this court in the court below, judgment was entered affirming the decree of the county court admitting the will to probate, and further providing that those parts of the previous judgment which provided for the payment of allowances for counsel fees to the proponent and to the contestants should stand, on the ground that such was the agreement of the parties. The judgment also allowed to the proponent the further sum of $300 as

counsel fees payable out of the estate for services in this court upon the previous appeal. The proponent appeals from that part of the judgment allowing the contestants counsel fees payable out of the estate, and the contestants appeal from that part of the judgment allowing the proponent $300 as counsel fees payable out of the estate for services upon the previous appeal.

For the proponent there was a brief by *Tullar & Lockney*, and oral argument by *Henry Lockney*.

For the contestants there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

WINSLOW, J. These appeals bring squarely before us the question as to the power of the circuit court to allow to the parties to a will contest counsel fees to be paid out of the estate in addition to statutory costs. It is not to be denied that the practice of making such allowances finds support in decisions of this court, and that prior to the decision in the case of *In re Donges's Estate*, 103 Wis. 497, the subject was in a state of considerable confusion.

That was an action for the construction of a will, the contest being between heirs at law and legatees; this is a contest as to the validity of a will, the contest being between heirs at law and the proponent of the will; but no reason occurs to us why the same rule as to the making of allowances for counsel fees outside of the statutory costs should not logically apply to one case as well as to the other. In that case the authorities were reviewed, the distinction between statutory costs and allowances for counsel fees pointed out, and the general subject of the power of the circuit court to grant such allowances payable out of the estate discussed, and a conclusion reached. That conclusion was, in general terms, that the allowance of counsel fees over and above statutory costs is without authority of law. In that case the executors were not parties to the litigation, and the question

as to whether such allowance might properly be made to an executor or trustee was expressly left undecided, for that reason. Attention was, however, called to the fact that, if such counsel fees had been incurred by an executor or trustee in the performance of the duties of his trust, and were proper in character and reasonable in amount, there is ample power to allow him credit therefor in the settlement of his accounts by the court charged with the duty of passing upon his official accounts.

In the case now before us there is no executor present, and hence no question arises as to the validity of an allowance to an executor. The proponent is the person named as executor in the will, but is not an executor, within the meaning of the law, because he has not qualified or received his appointment from the county court. *In re Will of Somervaill*, 104 Wis. 72. It results that the rule adopted, after full consideration, in the *Donges Case* is applicable to the present case. *Patton v. Ludington*, 103 Wis. 629.

It is sought to sustain the allowance to the contestants, however, on the ground that the parties agreed to such allowance in open court at the conclusion of the trial of the case in the circuit court. It appears by affidavits filed that after the case was originally decided in the circuit court and the will denied probate, the court asked the parties, "How much do you want for an allowance?" and that the attorneys for both parties replied, in substance, that they would leave it to the court, whereupon the court allowed them $500 apiece out of the estate in addition to taxed costs. Treating this as a stipulation between the parties, an interesting question is presented. Of course, parties who are *sui juris* and are dealing with their own property or rights may unquestionably control such property and rights by stipulation, as they choose, and their agreement will be respected and enforced by the courts. But it is difficult to see how parties who neither own nor control a fund or estate can stipulate away

any part of that fund of estate. In order to justify the court in ordering payments of this nature out of an estate by virtue of a stipulation, all who are beneficially interested in the estate should certainly join in the stipulation. If the proponent of a will and the contestants may, by stipulation, carve up the estate to pay for their litigation, and thus bind the court, an easy way is opened to dissipate estates and leave both legatees and creditors without redress. It is true that in the present case the contestants are also legatees, but there are other legatees not parties to the stipulation, and there may be creditors. To give binding force to the stipulation under such circumstances would be a clear departure from correct principles. Neither the trial court nor this court can be thus bound. On grounds of public policy and for the due protection of estates, we find no difficulty in holding that the present stipulation was ineffective, and that it does not in any way embarrass the court in the application of the law as laid down in the *Donges Case.*

Both appeals, therefore, are well founded.

By the Court.— Those parts of the judgment appealed from are reversed on both appeals, and the action is remanded for further proceedings according to law.

GIBSON, Appellant, vs. GIBSON and wife, Respondents.

October 16 — October 30, 1900.

Limitation of actions: Setting aside administrator's sale of land: Continuing trust: Infancy.

1. After the open, notorious surrender by an administrator of real estate of his decedent, pursuant to a sale thereof for the purpose of paying debts, he has no trust relation thereto which precludes the running of the statute of limitations against an action to set aside the sale on the ground that the administrator was interested therein.

2. An action to set aside an administrator's sale of land for fraud is not an action "for the recovery of real property," within the meaning of sec. 4218, Stats. 1898, but the period within which the action must be brought is prescribed by sec. 4221, and under sec. 4233 it cannot be extended, because of the infancy of the person entitled to sue, longer than one year after such disability ceases.

APPEAL from a judgment of the county court of Waukesha county: M. S. GRISWOLD, Judge. *Affirmed.*

Action to set aside aside an administrator's sale because he was interested therein. Defendant *Mark Gibson* was one of the administrators. The intestate died December 11, 1870, leaving a minor child, *Louis Gibson*, the plaintiff. The sale was made April 15, 1872, ostensibly to George H. Gibson, *Mark Gibson's* son. The evidence shows that *Mark Gibson* assisted his son to pay for the property upon the pretext that the latter had an associate in bidding off the property who failed to produce his part of the money to complete the purchase. About six months after the sale was confirmed, two months after the completion of the deed, and a month and a half after the recording thereof, George deeded one half of the property to his father. He died in 1893, leaving his father and mother, the defendants, as his only heirs. From that time to the commencement of this action defendants have held the entire title to the property, basing their right thereto upon the administrator's sale. Plaintiff became of age April 7, 1890. February 21, 1895, he commenced an action of ejectment against defendants to obtain possession of the property, upon the ground that the administrator's sale was absolutely void. Judgment was rendered in favor of defendants. Upon appeal to this court, it was said that the evidence indicated the existence of facts rendering the sale void, but the judgment was affirmed because the administrator's deed was voidable only, and, till set aside in an equitable proceeding for that purpose, ejectment would not lie in favor of the person entitled

to avoid it, he having no legal title to the property. [102 Wis. 501.] The judgment of this court was pronounced without prejudice to the right of plaintiff to bring such an equitable action.

This action was commenced April 27, 1899. The court found facts as above indicated, also the following: The land brought a full price at the sale. It was not struck off on the day advertised for the sale, though the bid of George H. Gibson was then received. The sale was adjourned, and on the adjourned day, without again offering the property for sale, it was agreed to report the sale as made to George in accordance with his bid theretofore made, which was done. *Mark Gibson* was in no way interested in the sale at the time it was made, nor till after the confirmation thereof, except that he was interested in having his son become the purchaser. He extended accommodations to his son not accorded to others, in order to further his desire to have the property go that way, and in that manner was unduly interested in the sale, though he committed no actual fraud nor did anything to the actual detriment of the estate he represented or the heirs of the intestate. The proceeds of the sale were all used in paying mortgage and other claims against the estate. Defendant *Mark Gibson* has occupied and improved the property for many years, believing he had a good title thereto, his improvements during that period amounting in value to $2,000. If plaintiff ever had a cause of action it is barred by the statute of limitations.

Judgment was rendered accordingly, and plaintiff appealed.

For the appellant there was a brief by *D. H. Sumner* and *Ryan & Merton*, and oral argument by *T. E. Ryan*.

For the respondents there was a brief by *Clasen & Walsh*, attorneys, and *Winkler, Flanders, Smith, Bottum & Vilas*, of counsel, and oral argument by *F. C. Winkler*.

MARSHALL, J. Respondents chiefly rely on the statutes of limitations to support the judgment. To that appellant says *Mark Gibson* was trustee of an express trust and cannot invoke the statutes of limitations to defeat the claim of his *cestui que trust.* True, *Gibson* was such trustee as regards a power of sale and control of the property in controversy for the payment of the debts of the deceased, but for no other purpose. *Barker v. Barker*, 14 Wis. 131; sec. 3823, Stats. 1898; *Carpenter v. Fopper*, 94 Wis. 146. His status as trustee was extinguished when the sale of the real estate took place. His relationship to the estate, which gave rise to the trust relation, was wholly terminated in 1872, when he was discharged as administrator. From that time, at least, there was an unequivocal disavowal by him of any trust relation to the plaintiff or to the property in dispute. The rule invoked applies only to continuing trusts. The suspension of the statutes of limitations, as to a person once a trustee, ceases upon the termination of his character as such, and before that time if he distinctly disavow the existence of the trust relation by holding the subject of the trust adversely, openly, and with notice to the *cestui que trust.* Angell, Limitations, § 174; *Riddle v. Whitehill*, 135 U. S. 621. There was obviously no continuing trust in this case that reached beyond the settlement of the administrator's account and his discharge, and no trust precluding the running of the statute of limitations in his favor after the open, notorious surrender of the subject of the trust pursuant to the administrator's sale.

Appellant's counsel further contend that the administrator's deed is open to attack because plaintiff, under sec. 4218, Stats. 1898, was entitled to five years after becoming of age within which to commence an action to recover the property conveyed thereby. Waiving the question of whether the five years had fully run before this action was commenced, the conclusive answer to appellant's proposition is

that the subject of such action is not the recovery of real property, but the cancellation of the administrator's deed; hence it is not governed by sec. 4218, but is governed by sec. 4221, Stats. 1898. Appellant first commenced an action to recover the property. That was held not maintainable, the title to the property not being in appellant, and his remedy, primarily, at most, being the right to maintain an action in equity to annul the administrator's deed for fraud, constructive or actual. *Gibson v. Gibson*, 102 Wis. 501. Sec. 4218 plainly refers to actions by persons possessed of the title to the subject of the litigation but wrongfully deprived of the enjoyment of it. This is an action to annul a voidable sale for fraud,—an action that, "on and before the 28th day of February, 1857, was cognizable by a court of chancery,"—as to which there is no statute of limitations other than sec. 4221, Stats. 1898,—the ten years statute. Therefore, by the express terms of that section it applies, except so far as the limitation period was suspended by appellant's disability because of his infancy. The only protection given him on that ground is contained in sec. 4233, Stats. 1898, which provides that, "if a person entitled to bring an action mentioned in this chapter [ch. 177], except actions for the recovery of a penalty or forfeiture or against a sheriff or other officer for an escape, or for the recovery of real property or the possession thereof, be, at the time the cause of action accrued, . . . within the age of twenty-one years, . . . the time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy; nor can it be extended in any case longer than one year after the disability ceases."

The conclusion necessarily reached is that the time for the commencement of this action terminated on the 7th day of April, 1891, long before the commencement of the action

for the recovery of the property which failed for want of title in appellant. There was a plea of the statute of limitations in that action, but the defendant prevailed on the merits in the court below, so there was no call for this court, on appeal, to say anything in regard to the effect of the limitation statutes. That subject was not presented for consideration in the briefs of counsel or mentioned in the opinion.

By the Court.—The judgment of the county court is affirmed.

LEITGABEL, Respondent, vs. BELT, Appellant. 108 107 [108 219

October 16 — October 30, 1900.

Estates of decedents: Claim for services by member of family: Express promise: Evidence.

Where a niece of the decedent became a member of his family during her infancy, she cannot recover against his estate for her services without proving an express promise on his part to pay her therefor; but such promise may be established by admissions of the decedent and by circumstantial evidence confirmatory thereof.

APPEAL from a judgment of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Affirmed.*

The claimant filed a bill against the estate of John Dailey, deceased, in county court, for services as housekeeper and servant, based upon a promise that, if she would perform such services, he would leave her his property. The county court found against the claim. On appeal to the circuit court, and upon some additional evidence, that court made findings for claimant, and gave her judgment for $792 and costs. *Phinatta Belt*, one of the heirs, brings this appeal.

For the appellant there was a brief by *W. O. Thomas*, attorney, and *C. H. Winkenwerder*, of counsel, and oral argument by *Mr. Thomas.*

For the respondent there was a brief by *Amazeen & Torbe*, and oral argument by *L. Torbe.*

BARDEEN, J. John Dailey died intestate and unmarried in September, 1898, leaving a sister, two nieces, and a nephew as his heirs. He left real estate worth about $1,500, incumbered for $900, and personal property valued at $300. Claimant was a daughter of his sister, and lived with relatives until 1876, when deceased took her to live with him. She remained with him continuously to his death, except during the year 1880 she was out at service. During the period she lived with him she did his housekeeping and worked about the farm, performing such manual labor as is ordinarily performed by male help, receiving her board and clothes, but no money. The court found that during such employment there was an oral agreement between deceased and the claimant that, in consideration of her keeping his house and helping about his farm work during the residue of his life, he would devise and bequeath to her all real and personal property as compensation for her services; that, relying upon such agreement, the claimant remained with him until his death and faithfully discharged her duties; and that her services were reasonably worth the sum stated. It is upon this finding that the chief attack is made. No evidence was offered as to these facts by the contestant. It is argued, however, that the claimant's evidence fails to disclose an express promise to recompense her for her services with that clearness the law requires. Undoubtedly, the claimant, being the niece of the deceased, and having become a member of his family during her infancy, cannot recover against his estate for her services without proving an express promise on his part to pay her therefor. *Ellis v. Cary*, 74 Wis. 176. It is equally true that such promise may be established by admissions of deceased and by circumstantial evidence confirmatory thereof. *Estate of Kessler*, 87 Wis. 660.

We think the evidence sustains the findings of the circuit court that there was an agreement between the parties as stated, and that her services were of the value as found by

the court. Such agreement is established by the claimant, by testimony drawn out on cross-examination, and by direct admissions of the fact made by deceased to several witnesses. The surrounding circumstances very much confirm this view. It is unnecessary to state the facts in detail. They bring the case quite within the rule stated in both the *Ellis* and *Kessler Cases*, before cited, so that a discussion of them would be neither helpful nor advisable.

By the Court.—The judgment of the circuit court is affirmed.

THE DOWAGIAC MANUFACTURING COMPANY, Respondent, vs. SCHROEDER, Appellant.

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October 16 — October 30, 1900.

Contracts: Signature induced by false statements as to contents: Negligence: Court and jury.

1. A German of considerable experience in the business of selling farm machinery signed a written contract to purchase two grain drills. He could read business papers in English, and his adult son, who had a good education and acted as his bookkeeper, was present, but neither of them read or tried to read the contract, though there was nothing to prevent it. *Held*, that he was guilty of negligence which prevents his defending against an action on the contract on the ground that he was induced to sign it by fraudulent representations as to its contents.
2. Where plaintiff's right of recovery is clear upon the undisputed evidence, the trial court, upon setting aside a verdict for defendant, may render judgment for plaintiff.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Affirmed.*

This is an action for the recovery of the purchase price of two grain drills sold by the plaintiff to the defendant by a written contract of sale. The defense relied upon was that the defendant was induced to sign the contract by fraudulent

representations as to its contents. The plaintiff's evidence showed the execution of the contract by both parties, the delivery of the drills as provided for by the terms of the contract, and the fact of nonpayment. The defendant's evidence concerning the alleged fraud in the procuring of the contract will be found sufficiently stated in the opinion. The jury returned a verdict for the defendant, but the court, on motion, set the same aside and entered judgment for the plaintiff for the purchase price of the drills, for the reason that no defense had been proven; and from this judgment the defendant appeals.

For the appellant there was a brief by *Feeney & Atwood*, and oral argument by *James H. Feeney*.

For the respondent there was a brief by *Ellis & Merrill*, attorneys, and *T. P. Silverwood*, of counsel, and oral argument by *Mr. Silverwood*.

WINSLOW, J. It was shown that the defendant purchased the grain drills in question by a written contract, and the only defense attempted to be made, or which the evidence tends to establish, was that the defendant was induced to sign the contract of purchase by means of fraudulent representations made by the plaintiff's agent as to the contents of the contract.

The principle of law is that, if it be clearly and satisfactorily proven that a party signed a note or contract relying upon false and fraudulent representations as to its true character, and was guilty of no negligence in failing to ascertain what the contract really was, he is not bound by it. *Bowers v. Thomas*, 62 Wis. 480, and cases cited.

The evidence in the case before us entirely fails to meet this test. The defendant was a German of considerable business experience. He had been in the business of selling farm machinery fourteen years. He claims he could not read English, but admits on cross-examination that he could read

enough to tell what the meaning of the contract was; and the proof was overwhelming, by his own admissions, that he could read business papers. He could write his name reasonably well, and admits making out notes for others to sign. He had been a school director in his district, and signed orders and teachers' contracts. His son, who acted as his bookkeeper, was present when the contract was signed, but was not called as a witness. This son was twenty-two years of age, and had a good education; but neither the father nor the son read or tried to read the contract, though the defendant admits that there was nothing to prevent it. Under these circumstances there was clear neglect in signing the contract without ascertaining its contents.

The plaintiff's right of recovery was clear upon the undisputed evidence; hence the trial court had power, upon setting aside the erroneous verdict, to render judgment in accordance with such undisputed evidence. *Gammon v. Abrams*, 53 Wis. 323; *J. & H. Clasgens Co. v. Silber*, 87 Wis. 357; *Calteaux v. Mueller*, 102 Wis. 525.

By the Court.— Judgment affirmed.

MURPHY, Plaintiff in error, vs. THE STATE, Defendant in error.

108 f110 — 111 a238
108 f112 — 111 e309
108 115 — 111 e324

October 16 — October 30, 1900.

Criminal law and practice: Rape: Improper statements and questions by prosecutor: Pleading: Instructions to jury: Lesser offenses: Presumption of innocence: Explaining "reasonable doubt:" Excessive punishment.

1. Where the other essentials of the crime are present, any actual penetration is sufficient to constitute rape, and the degree to which the person of the female was entered is not material.
2. Statements of the prosecuting attorney in opening the case, and questions on cross-examination of the accused, which merely tend to prejudice the jury and to induce them to believe the accused

guilty because of past transactions in his life in no way connected with the offense charged, are improper, and will work a reversal if it clearly appear that the accused may probably have been prejudiced thereby. In this case, however, references to the accused as a tramp, and questions as to his past life not bearing on his credibility, are *held* not to have constituted material errors, because the evidence properly introduced in proving the offense pretty clearly indicated that he was a tramp, and the improper questions elicited nothing prejudicial.

3. An information is not insufficient because the charging clause does not conclude with the words "against the peace and dignity of the state of Wisconsin."

4. The court should fully instruct the jury as to every offense included in the information of which the accused might reasonably, upon the evidence, be convicted. But on a prosecution for rape, failure to instruct as to the lesser offenses included therein was not an error prejudicial to the accused, where the jury understood that, unless they found from the evidence beyond a reasonable doubt all the facts requisite to a conviction of the full charge, they must render a verdict of acquittal.

5. Where the jury were charged that there was a legal presumption of innocence which entitled the accused to an acquittal unless overcome by the evidence, a refusal to give an instruction repeating the idea in different language, which might have impressed such idea more definitely upon the minds of the jury, was not a material error, though it would have been better to give it.

6. A charge that the presumption of defendant's innocence "continues till the state shall satisfy you beyond any reasonable doubt of his guilt," is *held* not to have been misleading, where what followed clearly indicated that the jury were to consider all the evidence, not merely that on the part of the state, in determining whether the presumption had been overcome.

7. Omission to explain to the jury the meaning of the term "reasonable doubt" is not error where no instruction on that point is requested. The giving or omission of such explanation is a matter in the discretion of the trial court.

8. For rape upon a girl ten years old, a sentence of imprisonment for twenty-five years, which by good conduct can be reduced to less than fourteen years, is not excessive, and cannot be said to violate the constitutional provision against cruel and unusual punishments.

ERROR to review a judgment of the circuit court for Fond du Lac county: N. S. GILSON, Circuit Judge. *Affirmed.*

The plaintiff in error was convicted of the offense of rape upon a child of the age of ten years.

T. J. Hoey, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

MARSHALL, J. No detailed statement of facts need be made in this case, or of the evidence relating thereto. It is deemed best to include in published records of such cases only so much of their history as is indispensable to an understanding of the points presented for adjudication and decided.

The first point made is that the verdict is not sustained by the evidence. The age of the girl and the opportunity for the accused to commit the offense were established beyond reasonable controversy. All the circumstances of the offense itself were positively testified to by the girl, and there is no such improbability in her story as to preclude the jury from believing it. Her testimony was corroborated by the usual proof of early complaint to her mother and of examination by a physician, disclosing a condition consistent with the theory that she had been abused to a sufficient extent to constitute the offense charged so far as carnal knowledge was concerned. In view of such evidence it needs no argument to show that the jury might reasonably have come to the conclusion which they did. The principal contention on this branch of the case is that the condition of the girl, considering her age and development, precludes the idea that she was violated to a sufficient decree to constitute the offense of rape. True, the evidence does not warrant the belief that her person was entered to any great degree; but if an entrance was effected at all, and there is ample evidence on that point, the additional extent of the violation of her body, if any, was not a material subject for investi-

gation. *Res in re*, the engagement of the sexual organs at all beyond surface contact, all the other essentials of the crime charged being present, fully consummate the offense of rape in all its revolting brutality and wickedness, and no punishment within the scope of the criminal statutes on the subject can properly be said to be excessive. The claim that the verdict is not warranted by the evidence is without merit.

Error is assigned because the district attorney was permitted, in opening the case to the jury, to speak of the accused as a tramp; also because, on cross-examination, inquiry was made into his past life. In those respects the conduct of the prosecuting officer cannot be wholly approved. Not that it was error, by any means, to inquire into the past life of the accused. That was proper if pursued for a proper purpose and in a proper way. In the opening statement to the jury the district attorney should always confine his remarks with reasonable strictness to a history of the offense charged and the connection of the accused therewith as he expects to establish the same by evidence to be produced; and in the cross-examination of the accused as to his past life the object aimed at should only be to fairly place before the jury the facts bearing on his credibility as a witness. Statements and questions merely tending to prejudice the jury and to induce a belief in their minds as to the guilt of the accused because of transactions in his life in no way connected with the offense charged, are beyond the scope of proper cross-examination and of a prosecuting officer's duty. It constitutes reversible error if it clearly appear that the accused may probably have been prejudiced thereby. It is to be regretted that those who stand at the bar of the court as representatives of the people in public prosecutions do not always comprehend and observe the plain limits of official duty. Lapses in that regard generally indicate inexperience, overzealousness, or want of those natural qual-

ities which are essential to a proper discharge of official duty. No lawyer who loves his profession and aims to excel in its work will consciously offend in such matters for the purpose of momentary success. The trial judge should be on the alert at every stage of the trial to prevent and rebuke such transgressions and to see that the accused person is protected from prejudicial consequences by such misconduct.

Notwithstanding what has been said, we are unable to say that the plaintiff in error was prejudiced by the matters complained of. The case comes far short of falling within the condemnation of *Buel v. State*, 104 Wis. 132. Plaintiff in error was referred to as a tramp, but afterwards the evidence produced in legitimately proving the offense charged pretty clearly indicated that he was of the class commonly so called. The inquiry into the past life of the accused was pursued by questions that did not bear on his credibility, yet nothing was elicited that by any reasonable inference pointed to him as a person liable to commit the offense charged. Nothing was added to what legitimately crept out in the course of the trial regarding the general character of the accused and his mode of life.

It is suggested that the information was insufficient in that the charging clause did not conclude with the words "against the peace and dignity of the state of Wisconsin." That proposition is ruled against the plaintiff in error by *Nichols v. State*, 35 Wis. 308.

It is further contended that the court erred in not instructing the jury that if they did not find with the degree of certainty requisite to a conviction of the accused of the full offense charged, but did conclude that he assaulted the girl with intent to commit the crime of rape or that he assaulted her without such felonious intent, they should find a verdict of guilty of the lesser offense established and of not guilty of any other charge included in the information.

Certainly it is permissible to convict of assault with intent to commit the crime of rape, or of simple assault, when the full charge in the information is the crime of rape, if the evidence establish beyond a reasonable doubt the commission of the lesser offense by the accused, but not the greater; and when the evidence is such as to reasonably permit that course, the jury ought to be fully informed in regard thereto, and the situation in this case called for such information. But it does not follow that reversible error was committed. It is one thing to err and another to commit prejudicial error. The former is to be disregarded, because justice is not thereby turned aside. The latter calls for correction, not merely for the error, but because it may have resulted in a conviction where otherwise an acquittal would have occurred. The great and primary end sought in all judicial proceedings is justice. If that be not jeopardized, within the range of reasonable probabilities, errors of omission or commission, however numerous, will not incline the judicial scales towards a disturbance of the result. There comes in the statute of this state, so often referred to as a beneficent provision that covers a multitude of errors and promotes certainty and economy in the administration of remedies for wrongs cognizable by courts, without any sacrifice of constitutional rights: "The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect." Sec. 2829, Stats. 1898. We must presume that the jury sufficiently understood that, unless they found from the evidence beyond a reasonable doubt the existence of all the facts requisite to a conviction of the plaintiff in error of the full charge made against him, they were required to render a verdict of acquittal. That, instead of prejudicing the jury against the accused, left them free to render a verdict of not guilty, though fully satisfied

of his guilt of a serious offense, but one less than the crime of rape. He was given a chance of escape from any punishment, though believed by the jury to be guilty, to some extent, at least, calling for severe punishment. In that he received an advantage to which he was not entitled, instead of being deprived of a right. However, from the standpoint of justice in the abstract, the court should, in any criminal case, fully instruct the jury as to every offense included in the information of which the accused might reasonably, upon the evidence, be convicted. *Dickerson v. State*, 48 Wis. 288; *Winn v. State*, 82 Wis. 571; *Odette v. State*, 90 Wis. 258; *Fertig v. State*, 100 Wis. 301; *Perugi v. State*, 104 Wis. 230.

Error is assigned on the refusal of the court to instruct the jury as follows: "The defendant in this case entered upon this trial with the presumption of innocence in his favor, and that presumption remains in his favor through the entire trial, and up to the time you shall agree upon your verdict." That is substantially a correct statement of the law applicable to the case. Many different ways are found in the books of stating the principle embodied in the requested instruction, some of which are not strictly accurate, and that applies to some of the cases cited to our attention in the brief of counsel. The subject was fully considered in *Emery v. State*, 101 Wis. 627, where it is said that strict accuracy may be attained by stating that the presumption of innocence attends the accused from the beginning to the end of the trial and must prevail unless overcome by evidence so as to establish guilt of the offense charged beyond a reasonable doubt. The instances where courts have held that a refusal to instruct the jury in that regard, in addition to the general instruction that the accused is entitled to an acquittal unless the jury are satisfied from the evidence beyond a reasonable doubt that he is guilty, is error, are grounded upon the omission to give the accused the benefit of the legal presumption of innocence. That

principle was fully stated to the jury in this case, unlike *Franklin v. State*, 92 Wis. 269, upon which counsel for plaintiff in error seems to rely. The jury having been told that there was a legal presumption of innocence which entitled the accused to an acquittal unless overcome by the evidence, a refusal to repeat the idea in different language, suggested by counsel for the accused, though such language might have more definitely impressed such idea upon the minds of the jurors, was not reversible error. However, it would have been better to have so given it. *Buel v. State*, 104 Wis. 132. We repeat what was there said,— the giving of special instructions on leading points in the case as requested by counsel, or the embodiment thereof in the general charge, especially in important cases, where such special instructions are more specific than the general charge covering such points as prepared by the trial judge, is advised; but the refusal to do so, when such general charge is sufficiently plain to be understood by persons of ordinary comprehension, does not constitute reversible error.

The trial court instructed the jury as follows: "The defendant entered upon this trial with the presumption of innocence in his favor, and that presumption continues till the state shall satisfy you beyond any reasonable doubt of the defendant's guilt." In that the legal presumption of innocence was correctly stated to the jury and given proper significance, unless the jury were misled by the language referring to proof by the state. It is contended that the jury may well have understood by the language used that the evidence on the part of the state only was to be weighed against the legal presumption of innocence, regardless of supporting evidence on the part of the accused; that they should have been told that, unless, upon the whole evidence, the legal presumption of innocence was overcome so as to establish the guilt of the accused to the exclusion of every reasonable doubt, such presumption should prevail by a ver-

dict of acquittal. We are not unmindful of the inaccuracy of the language used by the learned trial court, yet we cannot see how a man of common sense could have been misled thereby. Viewed in the light of common understanding, such language means that it is incumbent upon the state, as a condition precedent to a conviction, to establish the guilt of the accused by evidence, having regard to all the evidence in the case and the legal presumption of innocence. At least that is within the reasonable meaning of the words used, and what followed pointed to that as the meaning intended by the court so plainly that no reasonable ground exists to say that any other was attributed thereto by the jury. The court said: "It is incumbent on you to consider the testimony without passion and without prejudice, for the purpose of determining whether the defendant is guilty or not. He is entitled to the benefit of any reasonable doubt existing in the evidence in this case. If, after a full consideration of the testimony, you shall have any reasonable doubt of his guilt, you will give him the benefit of that doubt by an acquittal." The word "evidence" was iterated and reiterated in such a way as to indicate that the jury were to look not to the evidence produced by the state alone, but to the entire evidence produced upon the trial, having regard to the legal presumption of innocence, which, the court plainly told the jury, attended the accused to the end unless so overcome by evidence as to exclude from their minds every reasonable theory consistent with innocence.

A further contention is made that plaintiff in error was prejudiced by neglect to explain to the jury the meaning of the term "reasonable doubt." The conclusive answer to that is that no explanatory instructions on the point were requested. *Miller v. State*, 106 Wis. 156. A further and equally sufficient answer is that giving or omitting to give mere explanatory instructions regarding the meaning of language commonly used in the statement of a legal prin-

ciple is a matter of judicial administration which is left almost exclusively to the trial court. This court may advise in such matters, and will not hesitate to do so when that course seems to be promotive of the ends of justice, but cannot exercise control, unless all reasonable limits of judicial discretion be exceeded by the trial court. There was no excess of judicial discretion in this case in the matter referred to, nor anything approaching the limits of it.

A suggestion is made that the judgment of the court is excessive. A person familiar with the punishments that have in the past been commonly visited upon persons guilty of the crime of rape, especially where the victim was under the age of consent, will not seriously contend that a sentence to confinement in the state prison for twenty-five years, which by good conduct can be reduced to less than fourteen years, is excessive,—assuming the validity of the legislation giving to nonjudicial officers power to shape the judgments of the court with reference to the conduct of the convict. Courts pronounce judgments in criminal cases, but, unlike other judgments,—if the legislation referred to be valid, a question never passed upon by this court,—they are not to be executed as entered, regardless of the pardoning power or any change by higher judicial tribunals, but according to the legislative will. Formerly, in this state, the crime of rape upon a female under age of consent was punishable by life imprisonment. The law was not softened by any regard for such offenders, but in order to increase the certainty of their punishment. When the more severe punishment followed a conviction, jurors were slow to convict, though satisfied of guilt, because of the terrible consequences to the accused. Anciently, in England, rape upon a female capable of consenting to a sexual act was a capital offense, punishable by death, later by castration. Such punishments being deemed too severe were changed for a time, but experience led to a return to rigorous punishments, with broad

discretion in the trial courts, so as to fit punishments to the circumstances of each particular case, the maximum punishment being penal servitude for life. Such is the law to this day. Rape upon a female under the age of consent is treated uniformly as the highest degree of the offense. The maximum penalty, by the English statute, is the same in the one case as in the other. The minimum punishment in the one case is two years penal servitude, and in the other five years. 24 & 25 Vict. ch. 100, sec. 48; 48 & 49 Vict. ch. 69, sec. 4. The punishment under our statute for the greater offense is from five to thirty-five years, in the discretion of the court. That, it will be seen, follows the general lines of the law on the subject as it has existed, with the exception of the short interval mentioned, for ages. The statute cannot be said to violate the constitutional provision against cruel and unusual punishments. The age of the victim in this case was ten years, four years under the age of consent. The accused was an entire stranger to her. There was no circumstance to palliate the offense or to reduce it below one of the most revolting character, except absence of that degree of brutal treatment of the victim sometimes met with, which may well be attributed to the danger of immediate discovery on account of the surroundings at the time the offense was committed. On the whole there is no reason to say that the discretionary power of the court was not wisely exercised in fixing the punishment of the plaintiff in error at about fourteen years, conditioned upon his conduct being such as to entitle him to the maximum amount of credit for good behavior during his confinement.

By the Court.— The judgment of the circuit court is affirmed.

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RYAN, by guardian *ad litem*, Respondent, vs. LA CROSSE CITY RAILWAY COMPANY, Appellant.

September 5 — November 16, 1900.

Street railways: Injury to boy crossing tracks: Sounding of gong: Positive and negative testimony: Negligence of motorman: Contributory negligence of child: Court and jury.

1. In an action against a street railway company for personal injuries the positive testimony of the motorman and conductor that the gong was sounded after the former saw the plaintiff and before the car struck him, is *held* to establish that as a fact in the case, as against the negative testimony of plaintiff and other witnesses that the gong was not sounded or that they did not hear it.

2. Plaintiff, a boy eight years and nine months old, was struck and injured by a street car while he was attempting to cross the tracks. The motorman testified that when he first saw the boy he was about fifty feet ahead of the car and from seven to nine feet from the track, and was going diagonally towards the track; that the car was not running over twelve or thirteen miles an hour; and that he cut off his current and applied his brakes as soon as possible, and sounded his gong. There was evidence tending to show that a car running at that speed could have been stopped within less than fifty feet, and that this car ran forty feet or more after striking the plaintiff. *Held*, that the question whether the motorman was negligent was one for the jury, but that there was nothing to show that he intended to injure plaintiff or that his conduct was reckless, rash, or wanton.

3. The plaintiff was a boy of unusual intelligence, had lived opposite the place of the accident for two years, was accustomed to cross the tracks daily to attend school, and knew all about the situation. He had just seen a car pass on one of the tracks and knew that the cars going in the other direction (one of which struck him) ran on the other track, but did not look at all to see if a car was coming on that track, and his own testimony was contradictory as to whether he listened for it. There was nothing to prevent him from seeing the approaching car or to divert his attention. *Held*, that though he was but eight years and nine months old, he was, as matter of law, guilty of contributory negligence. DODGE and WINSLOW, JJ., dissent, being of the opinion that no conduct on the part of a boy of that age can properly be held negligence *per se* and as matter of law, and, even if the rule were otherwise, that under the circumstances in this case the question of the boy's negligence should have been submitted to the jury.

APPEAL from a judgment of the circuit court for La Crosse county: O. B. WYMAN, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Losey, Woodward & Lees*, and oral argument by *G. M. Woodward.* To the point that a verdict should have been directed on the ground of contributory negligence, they cited, besides cases cited in the opinion, *Downs v. St. Paul City R. Co.* 75 Minn. 41; *O'Rourke v. N. O. C. & L. R. Co.* 51 La. Ann. 755; *Dull v. C., C., C. & St. L. R. Co.* 21 Ind. App. 571; *Wolfe v. Pierce*, 57 N. E. Rep. 555.

For the respondent there was a brief by *Higbee & Bunge*, and oral argument by *E. C. Higbee.* To the point that plaintiff was too young to be held guilty of contributory negligence as a matter of law, they cited, besides Wisconsin cases cited in the dissenting opinion, *Berry v. N. Y. C. & H. R. R. Co.* 92 N. Y. 289; *Costello v. Third Ave. R. Co.* 161 N. Y. 317; *Ellick v. Metropolitan St. R. Co.* 15 App. Div. 556; *Mitchell v. Tacoma R. & M. Co.* 13 Wash. 560; *Lhowe v. Third Ave. R. Co.* 14 Misc. (N. Y.), 612; *Jones v. Brooklyn Heights R. Co.* 10 Misc. (N. Y.), 543.

The following opinion was filed September 25, 1900:

CASSODAY, C. J. This action is brought by the plaintiff to recover damages sustained April 24, 1898, by being struck by the defendant's car, running south on Caledonia street, between Clinton and St. Paul streets, in La Crosse. Issue being joined and trial had, the jury returned a verdict in favor of the plaintiff for $1,800, and from the judgment entered thereon the defendant brings this appeal.

It appears from the record and is undisputed that at the place of the injury the defendant maintained double tracks; that such double tracks ran from the south on Mill street to St. Cloud street; then east on St. Cloud street to Caledonia street; then north, crossing in succession Wall street, Windsor street, St. Paul street, Clinton street, and Logan street, and

to Sill street, which is the next street north of Logan street, and then the double tracks turn to the east on that street; that cars going south ran on the west track, and those going north on the east track; that the plaintiff lived with his father on the east side of Caledonia street, between St. Paul street and Clinton street, about 25 feet back from the sidewalk, and the walk ran from the house to the inner edge of the sidewalk at a point about 115 feet north of St. Paul street, and about 235 feet south of Clinton street; that about 65 feet north of that walk leading to the plaintiff's home was the south line of the Horner lot, the buildings thereon having a frontage of 25 feet on Caledonia street; that the north line of the Horner buildings, projected west across Caledonia street, is identical with the south line of the Club Saloon, fronting on that street on the west side thereof; that the entrance to the Club Saloon was 140 feet south of Clinton street, and 117 feet from the street end of the Ryan walk, in a southeasterly direction therefrom, and directly opposite a point 96 feet north from the street end of the Ryan walk; that from such entrance to the south line of the Club Saloon was 10 feet; that 50 feet immediately south of the Club Saloon was occupied by the double store building belonging to B. A. Siggins; that next south of the Siggins place, on the same street, was a barber shop with a frontage of 20 feet, and that 80 feet of the frontage next south of the barber shop was occupied by dwellings.

The plaintiff was nine years old July 23, 1898, and hence was three months younger at the time of the accident. A few minutes before 6 o'clock in the afternoon of the day of the accident the plaintiff was sent by his father from his home to the Club Saloon, across the street mentioned, to get a pail of beer. He testified to the effect that after he got the beer he came out of the Club Saloon, and walked out into the street, and then walked down south by the side of the track, when he saw that a car was coming from the

south on the east track; that he waited until that car passed him going north; that after that car passed him he was going to go home; that he was walking slowly by the side of the rail, with his pail full of beer, but no cover on it; that he was struck by the car on the left side of the back of his head, and knocked down, and the hind wheels of the car ran over him and dragged him some distance and cut off his toes; that he did not hear any bell just before he was struck, nor any warning or noise, to indicate that the car was coming behind him from the north; that his pail was small, and full of beer up to about two and one-half inches from the top, and that he was carrying it in his right hand; that he was afraid he would spill it; that when he came out onto the street he went over near the street-car track right in front of the saloon, but that he was not sure about that; that he was not looking at the beer; that he had often before that time crossed those tracks, and knew that the cars ran south on the west track and north on the east track; that he did not look up north to see whether there was any car on the track when he came out of the saloon, but did look south, and saw the car at St. Paul street coming north; that he never looked up north towards Clinton street at all; that when he got onto the track he kept on walking down the track; that he did not know how near he got to the west rail of the track; that he waited for the other car to pass him; that he did not stop in the street; that he was listening for a car from the north, and thought a car might be coming down on the track on the west side; that no bell rang; that he was listening for the bell, but did not look at all; that his back was turned to the north all this time, and his face directly south; that he first turned his face to the east when he attempted to cross; that he did not look up at all to see if there was any car or pay any attention to any car from the other direction; that he did not know how far the car going north got by him before

he started to cross, but it got some little distance away; that he was walking slowly in the street, and had not yet started to go across the track when the car struck him; that he was still walking down the side, and was outside the rail, when he was struck; that he thought that a car might be along on the west track; that both cars were in the same block when he got struck; that he did not know how far he walked down before he was struck, nor whether it was down as far as his father's house; that he did not look at all for the car that was coming down, and that he did not listen for it, nor pay any attention to it all; that he had lived there two years, and knew he must not get in front of a car, and that if he did he would get hurt; that he knew all about that.

The plaintiff's sister, sitting in her father's house, testified in corroboration of the plaintiff, and also to the effect that the two cars passed right in front of the Horner building, near the south end of the Club Saloon; that the plaintiff was struck about in front of the barber shop; that the bell was not rung immediately prior to his being struck; that she did not hear the danger bell, and did not know that it rang. The only passenger on the car testified to the effect that she could not say whether the bell rang or not; that she did not remember of hearing the gong sound. A witness for the plaintiff testified to the effect that a car running eighteen miles an hour could be stopped, by applying the brake and shutting off the current, within forty or fifty feet, and in less distance by reversing the current. There is also evidence to the effect that the defendant was authorized by ordinance of the common council to run its cars at a speed not exceeding twenty miles an hour. B. A. Siggins, who occupied the building immediately south of the Club Saloon, testified to the effect that he saw the boy just getting up off the ground a little north of the center of the barber shop, and that the car had then stopped, and the hind end of it

was just a little way south of the barber shop and ten or fifteen feet from the boy, and the front end about thirty feet from him; that there were marks on the ground where the boy had slipped or slid along in the beer about ten feet.

The motorman on the car in question testified to the effect that he had been working for the defendant twenty months; that he rang the bell as usual in crossing over Clinton stret; sounded the gong with his foot all the way across that street; that after crossing it he stood erect, with his hand on the controller,— on the brake,— looking straight ahead down the track; that he passed the north-bound car sixty or seventy feet north of the place of the accident; that he saw the boy about the time of the accident; that when he first saw him he was in the street,— he thought about the south end of Siggins's store, but could not say how far away from the street-car track; probably six or eight feet from the gutter when he first saw him; that he was then running diagonally southeast towards his home, probably fifty feet from the car; that he cut his current and applied his brakes as soon as possible, and sounded his gong more than once; that when the car struck the plaintiff he had got his current off and was tightening his brake; that everything on his car was equipped in good condition; and that he was not running over twelve or thirteen miles an hour at the time. The conductor of the car, who at the time was standing on the rear platform facing the south, testified to the effect that the car was running at the time ten or twelve miles an hour; that the bell rang as they passed over Clinton street crossing, and while passing the north-bound car, just before the accident; that the first thing that attracted his attention at the point of the accident, or near and just before, was the sounding of the gong and the shutting off the current and applying the brakes; that when the car stopped it was ten or twelve feet away from the boy lying upon the ground; and that the car was twenty-eight or thirty feet long.

Such is a brief summary of the evidence. The substantial facts are practically undisputed. Three questions are suggested by the record.

1. Was the evidence sufficient to take the case to the jury on the question of the defendant's alleged negligence? The evidence that the bell was rung while crossing Clinton street and while passing the other car just north of the place of the accident is undisputed. The affirmative evidence that it was again rung after the motorman saw the boy, and before he was struck, establishes that as a fact in the case, and it is not overcome by the negative evidence in the record. The well-settled rule applies that "the positive testimony of one credible witness to a fact is entitled to more weight than that of several others who testify negatively, or, at most, to collateral circumstances merely persuasive in their character." *Wickham v. C. & N. W. R. Co.* 95 Wis. 25, 26, and cases there cited; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 161, 162. But the motorman admits that when he saw the boy his car was about fifty feet from him, and that the boy was then six or eight feet from the gutter, going southeasterly, diagonally towards the track. The boy testified that he was near the west track, and going directly south, until he turned to go east across the track, but he fails to state just how near he was to the track while going directly south. It stands admitted that the west rail of the west track was fifteen feet from the gutter; so, on the motorman's statement, the boy was from seven to nine feet from the west rail when he first saw him. Still, on his statement as to the direction the boy was going at the time, and his testimony as to the speed of the car, and the other evidence as to the place where the boy was struck, and as to the place where the car was stopped, and as to the place where the boy was found after the car was stopped, we think it was for the jury to say whether the motorman was at the time in the exercise of ordinary care.

2. The most important question in the case is whether the

plaintiff was guilty of contributory negligence. The boy frankly admits that he knew that the south-bound cars ran on the west track, but that he at no time looked north to see if any car was coming on that track, notwithstanding he was listening for a car from the north and thought that a car might be coming down on that track. In another part of his testimony he testified that he did not listen for a car coming down from the north nor pay any attention to it at all. Had he been an adult, no one, we presume, would hesitate to say that his conduct was simply reckless. The question recurs whether the plaintiff is relieved from such responsibility by reason of his tender years.

It seems to be settled that where, as here, it appears from the undisputed evidence that the plaintiff, considering his age and intelligence, did not exercise proper care in crossing the track, the trial court may determine, as a proposition of law, that the plaintiff is guilty of contributory negligence and cannot recover. *Ewen v. C. & N. W. R. Co.* 38 Wis. 614 (Syl., point 6). In that case the plaintiff was only eight years old. See *Strong v. Stevens Point*, 62 Wis. 255, 264, 265, where the boy was only eight years old. *Reed v. Madison*, 83 Wis. 176. In Massachusetts it has recently been held that an action for damages for the death of a boy eight years and one month old, by reason of the alleged negligence of the motorman, could not be maintained where it appeared "that the car could be seen for a considerable distance as it was approaching, and its sound could be plainly heard; that the boy's view was unobstructed; that the railway had but a single track, and the distance from the curbstone of the narrow sidewalk to the nearest rail was only about twelve feet; and that he ran rapidly from the walk to the track in front of the car, and no reason or excuse was disclosed for his so doing." *Morey v. Gloucester St. R. Co.* 171 Mass. 164. In New York it has been held that "a child between eight and nine years of age, who attempts to cross a city street

in the middle of a block, either without looking for an approaching street car, or in blind and heedless disregard of its rapid approach, is guilty of contributory negligence." *Weiss v. Metropolitan St. R. Co.* 33 App. Div. 221, and cases there cited. In a very recent case in New Jersey, "a boy nine and one half years of age, playing in a public street, ran across the track of a trolley road, and was struck and injured by a passing car. He testified that he neither saw nor heard the car. There was no obstacle to his seeing the car if he had looked before going on the track. Held, that a verdict in his favor cannot be supported." *Brady v. Consolidated T. Co.* 45 Atl. Rep. 805. A similar rule has been applied in that state to a girl nine years old, injured while attempting to cross a street-railway track. *Fitzhenry v. Consolidated T. Co.* 46 Atl. Rep. 698. So it has been held in Pennsylvania that, "in an action against a street-railway company to recover damages for the death of a boy twelve years old, a nonsuit is properly entered where the evidence shows that the deceased, while playing with other boys upon the street at the time of the accident, ran upon one of the railway tracks without paying any attention to the approach of a car, a few feet away, and then, hearing a shout from some companions, stopped, looked in the wrong direction, and was struck by the car." *Pletcher v. Scranton T. Co.* 185 Pa. St. 147.

In the case at bar the plaintiff had attended school for three years and was at the time in the third grade of the ward school, and it appears from his testimony that he is a boy of unusual intelligence. He had lived right opposite the place of the accident for two years, and was in the habit of daily crossing the tracks to attend school, and saw the car, just before, pass north on the east track, and knew that south-bound cars ran on the west track. There was nothing to prevent him from seeing it nor to divert his attention. He knew all about the situation. The very object of double

tracks was to allow the cars to pass at any place. Upon the evidence in the record and the adjudications cited, and numerous others in the same line which might be cited, we must hold that the plaintiff was, notwithstanding his age, guilty of contributory negligence.

3. This being so, the judgment cannot be sustained, unless we can say from the record that the motorman was guilty of gross negligence. To constitute such negligence the facts must show such a degree of rashness or wantonness on the part of the motorman as evinces a total want of care for the safety of the plaintiff. *Lockwood v. Belle City St. R. Co.* 92 Wis. 111–113, and cases there cited; *Schug v. C., M. & St. P. R. Co.* 102 Wis. 520–523. But there is nothing in the record to indicate that the motorman was guilty of any such rashness or wantonness. He had just passed a car. He was in the middle of a block, where pedestrians were not ordinarily expected to be. The boy, when he first saw him, according to his statement, was from seven to nine feet from the track. He certainly made an effort to stop the car, and there is nothing to show that he intended to run the boy down, nor to indicate that his conduct was reckless, rash, or wanton.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

DODGE, J. While I concur in the conclusion reached by the court that the evidence tends to establish negligence on the part of the motorman, and that it does not tend to establish gross negligence, I am unable to concur in the view that the conduct of the injured boy can properly be declared negligence in law. For the purpose of defining my view on this question, I think certain facts, to establish which there is at least some evidence, should be added to those stated in the opinion filed on behalf of the court, or more emphasized. The boy, eight years and nine months of age,

had been sent across these railroad tracks on a hurried errand for some beer for supper, just as the family were about ready to sit down to the table. He therefore was unquestionably impressed by the necessity of haste in returning. As he started on his return he observed a car coming from the south, in such proximity that he deemed it unsafe to attempt to cross ahead of it, and proceeded in the general direction of his home, down the street, with his attention fixed on this car, waiting for it to pass him. The evidence is in conflict as to whether he walked close to the west track or some six or seven feet away from it. According to his testimony, he walked near it, and was struck just as he started across it, after the north-bound car had passed him. According to the motorman's testimony, he had turned some six or seven feet away from the track, and was coming on a line almost at right angles to it. This conduct would, of course, have made the presence of the car almost certainly apparent to him, unless he had industriously refrained from taking note of what was in plain sight. The situation in which he places himself, that of walking near the track and having just commenced to cross it, would not bring the car within his vision, and the proximity of the north-bound car would account for his failure to hear the sound of it. His attention was fastened upon the north-bound car, which he had judged to imperil an earlier crossing, and he gave no thought to a south-bound car, having, as he testified, never known of cars passing each other in that block. Upon this subject the testimony of the railroad employees is that the regular and customary place of passing was about three blocks north, but that it was by no means infrequent that cars were thrown out of their time so that they passed within the block in question.

The rule asserted in many courts, that no set of facts could justify a court in holding conduct of a child of tender years negligent as matter of law, though a jury might find it so

as a fact, while fully conceding the power and duty of the same court to declare acts of an adult so clearly negligent as to leave no question of fact for the jury, has never seemed to me entirely logical or consistent. But the law is what the courts of last resort have decided it to be, and the rule of law above stated is too well settled in this state to be questioned by reason of the opinion of any individual as to its soundness as *res integra*. Applying that rule, this court has never yet held that any conduct on the part of so young a child as *William Ryan* could properly be declared contributory negligence as a matter of law. In *Lofdahl v. M., St. P. & S. S. M. R. Co.* 88 Wis. 421, a boy sixteen years old, wholly familiar with the movement of trains in the locality in question, was held to be negligent in law; but in *Johnson v. C. & N. W. R. Co.* 49 Wis. 529; *S. C.* 56 Wis. 274, a boy six years and nine months old was said to be too young to be guilty of contributory negligence as a matter of law. In *McVoy v. Oakes*, 91 Wis. 214, the same thing was said of a boy seven years old; and in *Carmer v. C., St. P., M. & O. R. Co.* 95 Wis. 513, it was said, on authority of the last-mentioned case, that a boy eight and a half years old was certainly not guilty, as a matter of law, of contributory negligence for climbing through a freight train, although the same conduct by an adult would have been held negligence by the court. It was there also said that, generally speaking, the question of a child's due care is for the jury. Thus, it has apparently been determined by this court that it cannot be said, as matter of law, that conduct on the part of a child either six, seven, or eight and a half years old is contributory negligence. Just where the line falls between that age and sixteen when it ceases to be exclusively for the jury and may be clear enough to be passed upon by the court, has heretofore been undetermined. In 1 Shearm. & Redf. Neg. (5th ed.), 112, it is said that the question of the power and duty of any child between three and twelve years to exercise care for its protection is held to be for the

jury. All of the previous decisions of this court are consistent with that statement. Thus, in the following cases the question was held to have been properly one for the jury and the conduct of the trial court in submitting it met the approval of this court: *Ewen v. C. & N. W. R. Co.* 38 Wis. 628, where a nine-year-old boy started to run across railroad tracks, and stopped on the track, when a train was approaching close at hand and ran over him; *Hemmingway v. C., M. & St. P. R. Co.* 72 Wis. 49, where an eleven-year-old boy jumped from a moving train as it was passing his station; *Whalen v. C. & N. W. R. Co.* 75 Wis. 654, 663, where a thirteen-year-old boy walked 100 feet on a railway track in plain sight of an approaching train but did not observe it. It was said: "Had he been an adult, we should be strongly inclined to hold that contributory negligence on his part was conclusively proved. But he was not an adult. He was a little less than thirteen years old. Under well-settled rules of law, the court properly submitted to the jury the question of the degree of diligence required of him." These are the principal cases in our own court in which the question of juvenile negligence has been discussed, and they seem to sustain two propositions: The one above stated, that with very young children the question must always be for the jury, unless, indeed, they are so young that the court must say they could not, under any circumstances, be chargeable with negligence; and, secondly, that above that age it is generally a jury question, and the circumstances must be very exceptional which justify the court in assuming to decide the question. Under the law as established in this state it seems to me certain that no court can properly hold that any conduct by a boy of the age of this one is negligence *per se* and as matter of law, but that the question must always be open to difference of opinion, so that it must be submitted for the unanimous decision of a jury of ordinary citizens.

Passing this consideration, and conceding the possibility

of conduct of an eight-year-old boy being so clearly negligent as to justify withdrawal of the question from the jury, I cannot concur in the view that the evidence in the present case is so certain, free from conflict, and unambiguous, and that the conduct disclosed is so clearly more negligent than could be expected of the great mass of children of his age and intelligence under like circumstances, that reasonable minds might not differ thereon. The evidence has been subjected to the scrutiny of the trial judge, who, having superior facilities for observing and understanding the witnesses, including the boy himself, has decided that his conduct was not so clearly negligent that ordinary minds could not honestly differ upon that question, and a jury of twelve men have unanimously decided that it was not negligent. The question, as in all cases of negligence, is, What care do the great mass of children of similar age and intelligence, familiar with street cars and tracks, ordinarily exercise under circumstances like those here presented? This question is one upon which it is peculiarly unsafe for an adult mind to attempt to be dogmatic. Multitudinous considerations are involved in juvenile conduct which could not reasonably be expected of an adult: appreciation of only part of the surrounding circumstances, mistakes in judgment, inconsiderate or hasty decision and action,— all are to be expected of the infant. If the childish mind of this boy,— burdened by his duty of haste to return to the family supper table, and perhaps by peril of punishment for delay, engrossed by thoughts of avoiding the danger from the north-bound car which he observed,— was momentarily diverted from the peril of a car coming upon him from the north, may not reasonable minds differ as to whether that is so unusual among children of his age that he must be charged with negligence in law? It seems to me they well may, independently of the fact that minds, presumably reasonable, have differed, and the majority thereof reached a conclusion contrary to that embodied in the decision of the court.

WINSLOW, J. I concur in the views expressed by Mr. Justice DODGE.

Upon a motion for rehearing counsel for respondent contended, *inter alia*, that even if the boy was negligent that fact did not justify the motorman in running over him, when, as the evidence shows, he had ample time to stop. A verdict should be directed only in those cases in which it conclusively appears that the child ran so quickly in front of the car that the motorman had no ground to apprehend such action; and all the cases cited by the court are of that nature. *Rooks v. Houston, W. S. & P. F. R. Co.* 10 App. Div. 98; *Louisville R. Co. v. Blaydes*, 51 S. W. Rep. 820; *Gutierrez v. Laredo E. & R. Co.* 45 S. W. Rep. 310; *Geoghegan v. Third Ave. R. Co.* 51 App. Div. 369; *Baltimore City P. R. Co. v. Cooney*, 87 Md. 261; *Tarler v. Metropolitan St. R. Co.* 21 Misc. (N. Y.), 684; *Montgomery v. Lansing City E. R. Co.* 103 Mich. 46; *Baltimore C. R. Co. v. Rifcowitz*, 89 Md. 338; *Weitzman v. Nassau E. R. Co.* 33 App. Div. 585.

The motion was denied November 16, 1900.

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KYES, Appellant, vs. ST. CROIX COUNTY and others, Respondents.

September 8—November 16, 1900.

(1, 2) *Injunction against illegal bond issue: Right of taxpayer to sue.* (3–5) *Counties: Bonds: Limitation on amount: Providing for collection of tax to pay them.*

1. A taxpayer may maintain an action to restrain the illegal issuance of county or municipal bonds or the unlawful incurring of municipal debt, because of his liability to taxation to meet the proposed bonds or debt, without showing himself to be directly interested in the performance of the act, omission of which causes the illegality.

2. Where the issuance of county bonds would be illegal because of the failure to make an irrepealable provision for the collection of a direct annual tax sufficient to pay them, as required by sec. 658, Stats. 1898, a taxpayer of the county has a direct pecuniary interest to be affected by such failure; for such a provision would tend to enhance the price of the bonds, to the benefit of the county and the relief of the taxpayer.
3. Bonds issued for the construction of a county insane asylum, under sec. 603, Stats. 1898, are not issued "to provide county buildings," within the meaning of sec. 658, Stats. 1898, limiting the amount to which bonds for the latter purpose may be issued.
4. Sec. 658, Stats. 1898, provides that no bonds shall be issued thereunder unless the resolution or ordinance of the county board, authorizing the same, "shall also provide for the collection of a direct annual tax sufficient to pay the interest as it falls due and to pay the principal within the time fixed therefor." Sec. 659 provides that "the tax provided therefor shall be incapable of repeal, but shall be annually collected," etc. *Held*, that a resolution declaring that "there shall be annually levied by the county board . . . at the annual sessions thereof . . . a direct annual tax sufficient to pay," etc., does not provide for the *collection* of such tax, as intended and required by sec. 658, but is only a promise or a command, not binding upon future county boards.
5. Compliance with such requirement of sec. 658, Stats. 1898, cannot be held unnecessary, nor can the bonds be held valid in spite of noncompliance, even if a clear and imperative duty to raise an annual tax to meet the bonds is imposed by law or by the constitution upon the county.

APPEAL from an order of the circuit court for St. Croix county: B. F. DUNWIDDIE, Judge. *Reversed.*

Appeal from an order sustaining demurrer to a complaint by the plaintiff, a taxpayer, on behalf of himself and other taxpayers, to enjoin the execution, delivery, negotiation, and sale of certain county bonds, and to enjoin certain of the defendants, designated as a committee, from tearing down or removing old county buildings, or contracting for the building of new. The complaint alleged a resolution by the county board for the issue of $50,000 of bonds to provide for the cost of proposed court-house, jail, and sheriff's resi-

dence, which by the same resolution were authorized to be contracted for by a committee of three persons named as defendants, to be residents of the county, and to have full power to adopt plans and specifications, execute contract, supervise the construction, and direct the signing of orders by the chairman and county clerk from time to time to pay therefor.

The grounds of invalidity alleged in the complaint were—*First.* That the county, having an assessed valuation of $5,579,504, was already indebted in the sum of $65,000 for bonds issued to build a county asylum for chronic insane, which, with the proposed $50,000, would exceed one and one-half per cent. of the valuation. *Second.* That the resolution aforesaid made no provision for the collection of any tax to meet the interest or principal of said bonds, except the following: "There shall be annually levied by the county board of said *St. Croix County*, at the annual sessions thereof, upon the taxable property of *St. Croix County*, a direct annual tax sufficient to pay the interest upon said bonds as it falls due, and to pay the principal of the same within the time fixed therefor." *Third.* That the delegation of authority to the committee was unlawful. The defendants opposed each of these contentions, and themselves assert, in addition, that the plaintiff, as a taxpayer, cannot invoke the aid of the court by injunction, even though the proceedings be held unlawful in any or all of the respects aforesaid.

For the appellant there was a brief by *E. B. Kinney* and *E. B. & R. E. Bundy*, and oral argument by *E. B. Bundy*.

James A. Frear, district attorney, and *A. L. Sanborn*, of counsel, for the respondents, contended, *inter alia*, that the resolution in question contains a sufficient provision for the collection of a tax, as required by secs. 658, 659, Stats. 1898, and sec. 3, art. XI, Const. *Bassett v. El Paso*, 88 Tex. 168; *Mitchell Co. v. City Nat. Bank*, 91 Tex. 361; *City Council of Dawson v. Dawson W. W. Co.* 106 Ga. 696; *State ex rel.*

Spring Lake v. Pierce Co. 71 Wis. 321; *Morton, Bliss & Co. v. Comptroller Gen.* 4 S. C. 430. The provisions of the statute are read into and form a part of the resolution. The constitutional provision is self-executing. No supplemental legislation is necessary to make it effectual. Cooley, Const. Lim. 100; *East St. Louis v. People ex rel. Gundlach*, 124 Ill. 655; *East St. Louis v. Amy*, 120 U. S. 600; *Frantz v. Jacob*, 88 Ky. 525.

The following opinion was filed September 25, 1900:

DODGE, J. 1. The first objection raised to the complaint is that the plaintiff is not entitled to maintain this suit, though a taxpayer. The general right of such a plaintiff to invoke the preventive aid of a court of equity against the illegal issue of county or municipal bonds, or unlawful incurring of municipal debt, because of the threatened burden on him as a taxpayer, is too well established by decisions of this court to justify discussion. *Peck v. School Dist.* 21 Wis. 516; *Lawson v. Schnellen*, 33 Wis. 288; *Lynch v. E., L. F. & M. R. Co.* 57 Wis. 430; *Fowler v. Superior*, 85 Wis. 411.

Respondents seem to urge, however, that interest because of liability to taxation to meet the proposed bonds or debt is not sufficient, but that plaintiff must show himself directly interested in the performance of the act, omission of which causes the illegality; at least, such seems to be the force of the argument that only the bondholder is interested in having provision made for the collection of a tax to meet principal and interest. This is a novel contention, and smacks of overrefinement. It is not because plaintiff is affected by nonprovision in advance for a tax, but because he is affected by the burden of a debt, either actual or ostensible, about to be cast on the taxpayers illegally, that he may be heard in equity to enjoin it. Thus, in *Lynch v. E., L. F. & M. R. Co.*, *supra*, the illegality of bonds was predicated upon the form of submitting a question to popular vote, and upon the fact

that the railway company claiming the aid had procured another company to build the road for it. Obviously, in neither of these facts had the individual taxpayer any valuable interest, but he was held entitled to sue. Much the same is true of others of the cases cited above, which therefore repudiate the distinction now contended for.

It is apparent, however, that plaintiff had a direct pecuniary interest to be affected by failure to provide fully by irrepealable legislation for a tax to meet these bonds; for such a provision would tend to enhance their price to the benefit of the county treasury, and therefore to the relief of himself as a taxpayer.

2. The first question as to the legality of the proposed bonds depends on whether the other bonds issued for the construction of a county insane asylum, under sec. 603, Stats. 1898, are within the terms of sec. 658, limiting the issue of bonds for county buildings to one and one-half per cent. of the assessed valuation. Upon examination of the statute, we find under the title "County Government," and in ch. 35 ("Of General Provisions Relating to Counties"), sec. 656: "Each county shall, at its own expense, provide at the county seat a court-house, a jail, fireproof offices, and other necessary buildings, suitable to their proper uses," etc.; and sec. 658: "Any county may issue bonds in the manner hereinafter provided for the following purposes: (1) To provide county buildings; but no county shall issue bonds for such purpose to an amount exceeding one and one-half per centum upon the assessed valuation of taxable property." The first of these sections dates from 1849, and the latter from 1872. In 1878 was adopted certain legislation authorizing the construction of asylums for the chronic insane in such counties as the state government might approve, the purpose of which evidently was to perform a part of the duty of caring for the insane theretofore performed by the state. The state joined with the counties in

the construction and maintenance. This legislation crystallized in 1893 in what is now sec. 603, Stats. 1898: "Any county board may, with the consent of the state board of control, purchase a site for an asylum for the chronic insane, and erect thereon . . . buildings for the care of such insane, and levy taxes and issue bonds to defray the cost of such site and buildings," etc. Then follow provisions as to the maintenance of such asylums, the care of insane chargeable to the county, and of chronic insane committed to it from other counties, with provision for the payment for their support, part by the state and part by the counties from which they came. This legislation, both in the Revised Statutes of 1878 and in the Wisconsin Statutes of 1898, is contained under the title, "Public Charities," and in ch. 32, "Of the State Hospitals and County Asylums for the Insane." The county asylum need not be built at the county seat, as was required by sec. 656 for the buildings therein mentioned, to which from its contiguity sec. 658 would seem to relate. An inspection of the course and form of this latter legislation makes it, we think, entirely obvious that the legislative purpose therein contained was to enlarge the powers of the counties, and that the erection and maintenance of county asylums for the chronic insane was an added power, not intended to be restrained by the then existing provisions of sec. 658. This conclusion is aided by the consideration that the erection of such asylums, in theory at least, brought to the county a revenue resulting from the saving of what it must otherwise pay to the state, and from contributions by the state toward the support of inmates, so that the ordinary revenues of the county would be relieved and increased to an extent more than sufficient to cover the interest on the cost of the asylum. It is well known that most of the counties which in fact constructed county insane asylums did so with the expectation that they would be productive of actual profit, which expectation was

apparently realized in some instances. The situation is not different in principle from that presented to this court in *Oconto City W. S. Co. v. Oconto*, 105 Wis. 76, where it was held that subsequent authority to a city to contract for a water supply was not restrained by the pre-existing limitation in its charter upon taxation. We conclude, therefore, that the bonds issued for a county insane asylum are not to be considered within the limitation of one and one-half per cent. prescribed by sec. 658.

3. A further ground of illegality in the issue of the proposed bonds is the asserted failure to obey that clause of sec. 658, as follows: "No bonds shall be issued hereunder except in pursuance of the resolution or ordinance . . . passed, . . . nor unless such resolution or ordinance . . . shall also provide for the collection of a direct annual tax sufficient to pay the interest as it falls due and to pay the principal within the time fixed therefor." This is followed by sec. 659, enacted at the same time: "For the punctual payment of the principal and interest of such bonds the faith of every county issuing the same shall stand irrevocably pledged, and the tax provided therefor shall be incapable of repeal, but shall be annually collected in addition to all other taxes and be kept as a separate fund and applied to that sole purpose." Does the resolution quoted above, declaring that "there shall be annually levied by the county board," etc., provide for the *collection* of such tax as intended and required by sec. 658? It is historical that the years preceding 1872 were characterized by attempts at repudiation of their bonds by several of the subordinate political divisions of this state, and the courts, both state and federal, found themselves without power to fully frustrate these attempts. 2 Dillon, Mun. Corp. (4th ed.), § 861, note; *Rees v. Watertown*, 19 Wall. 107. The insuperable difficulty met by the courts was their inability to coerce the legislative steps towards taxation necessary to cast a duty of collection

upon the clerical and ministerial municipal officers, and their inability to assume and perform the functions of the municipal legislatures, when, as was the practice, those legislatures had gone out of existence by resignation of their members. The people of the state generally evidently did not approve, and, appreciating at once the dishonor and the practical disadvantage of an impairment of the credit of their municipalities, by legislation, in ch. 184, Laws of 1872, afterwards modified in the revision of 1878, and by popular vote upon the amendment of 1874 to sec. 3, art. XI, of their constitution, sought to supply the one step to coerce which the power of the courts had been found inadequate, and enacted that before such corporations could send their bonds into the financial world the legislative step necessary to the prompt and regular *collection* of taxes to meet principal and interest must be taken, and should thenceforward be irrevocable.

Such having been the purpose of this legislation, it seems obvious that the resolution under examination does not satisfy it. That resolution in no sense purports to be a final and complete exercise of the county board's legislative function to levy a tax so that the county clerk's duty to apportion it, and that of the town officers to collect it, is cast upon those officers. It is by its terms only a promise on behalf of, or a behest to, future county boards that they shall perform the duty year by year which the law imposed on the board of 1899 to be performed once for all time. One county board cannot bind its successors either by a promise or a command. The object of the law is not accomplished. The prospective purchaser of the bonds is not assured that there has been cast upon the ministerial officers an imperative and irrevocable duty to collect money to pay his interest and principal when they collect other taxes, so that upon them must fall all the penalties for breach of official duty if they attempt to raise ordinary county revenue without providing

a fund definitely appropriated to him, nor so that may be compelled by *mandamus* each of the acts enjoined upon them by law whenever the county board legislates that a certain sum shall be raised by taxation. See *Morton, B. & Co. v. Comptroller General*, 4 S. C. 430, 451.

It is urged, however, that both the law and the constitution so clearly impose a duty upon the county to raise an annual tax to meet their bonds that *mandamus* would lie to compel it, so that compliance with the requirement quoted from sec. 658 is immaterial. To this suggestion more than one answer is obvious: *First.* That when the legislature deems best to impose a restriction upon the incurring of municipal indebtedness it is for the courts to enforce the restriction, not to declare it unnecessary or unwise. *Second.* Neither the constitution nor any law does impose upon subsequent county boards the duty to levy a tax to meet either principal or interest of these bonds. They stop with the command that such provision shall be made before the bonds issue and that no subsequent board shall repeal it. Therein our laws are distinguished from that under consideration in the case cited by respondents. *Mitchell Co. v. City Nat. Bank*, 91 Tex. 361.

The further answer is that, even if a clear and imperative duty is by law or constitution imposed on the county, that duty rests on the county board, and its enforcement is subject to the infirmities experienced in *Rees v. Watertown*, 19 Wall. 107, and kindred cases, which, as stated above, the very purpose of this legislation was to avert. Concede that without the resolution demanded by sec. 658 it will be the duty of the county board each subsequent year to levy a tax to meet these bonds; concede, too, that *mandamus* will lie to command such levy; experience has shown that by the simple expedient of resignation after they have levied other taxes the sanction of the legislative command and the efficacy of the writ of *mandamus* may both be evaded by the supervisors.

Our conclusion is that the county board did not by its resolution authorizing the bonds in question provide for collection of a direct annual tax to meet interest and principal thereof as required by sec. 658, that their issuance is forbidden by that section, and that the complaint states facts sufficient to constitute a cause of action to enjoin the county officers from further steps toward that end.

The conclusions already reached necessitate a reversal of the order sustaining the demurrer, and a direction to overrule the same. We deem it unnecessary, therefore, to decide the important, and somewhat doubtful, question as to the validity and effect of the delegation of so broad and unusual discretion and power to a committee, which may become immaterial, or may be presented more fully, or in a different light, by facts to be disclosed upon full answer and trial. We therefore refrain from expressing our views thereon.

By the Court.— The order appealed from is reversed, and the cause remanded with directions to overrule the demurrer.

On a motion for a rehearing counsel for respondents contended that there is an important and radical distinction between counties and other municipal bodies. A city council can, but *a county board cannot*, so levy a tax for the future as to exclude legislative action by future boards. It is absolutely impossible for one county board to exhaust the legislative duty of taxation. It cannot in any possible way "cast upon the ministerial officers an imperative and irrevocable duty to collect money to pay his interest and principal when they collect their taxes," because there still remains a legislative duty — that of apportionment — *which can only be done from year to year.* The resolution in question, by determining the amount of the tax, and commanding its levy by future boards, went as far as possible, and the action is valid.

The motion was denied November 16, 1900.

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MONTGOMERY, Executor, Appellant, vs. AMERICAN CENTRAL INSURANCE COMPANY, Respondent.

October 16 — November 16, 1900.

Insurance against fire: Michigan standard policy: Independent agreement for appraisal of loss: Effect of award: Estoppel by construction: Public policy: Married women: Statutory and common-law awards: Consideration: Offer of judgment: Costs.

1. After a loss under a Michigan standard fire policy providing that in case of disagreement the amount of loss should be submitted to appraisers whose award should be *prima facie* evidence of such amount, the parties signed a written agreement for submission to appraisers, providing that their award should be *binding and conclusive.* In an action on the policy the evidence is *held* not to sustain plaintiff's contention that said agreement was procured by defendant's representation that it was such an agreement as was provided for in the policy and that both parties so construed and acted upon it.
2. In the absence of fraud or mistake the insured is conclusively presumed to have known the contents of the appraisal agreement.
3. Such an appraisal agreement, though providing that the award should have an effect different from that provided for in the standard policy, is not void on the ground that it is contrary to the policy of the law (How. Ann. Stats. Mich. ch. 137) under which the standard policy was adopted, which prohibits the use of any other form of policy and provides that "every policy or contract made or issued contrary to the provisions of this act shall be void." Neither that statute nor the standard policy precludes the parties from contracting, after a loss, with reference to its settlement.
4. Such an appraisal agreement may be made by a married woman under the laws of Michigan, which authorize married women to acquire and hold property and to make contracts in relation thereto and to sue and be sued in relation thereto the same as if unmarried.
5. An award of the appraisers under such an agreement, though not a statutory award because not in accordance with the statutes relating to the subject, may nevertheless, if otherwise unobjectionable, be enforced as a common-law award.
6. Such an appraisal agreement need not be based upon any new consideration.
7. The provision of such an agreement that the award shall be binding and conclusive as to the amount of loss, since it does not go to the

whole groundwork of the controversy, does not render the agreement void as against public policy on the ground that it ousts the courts of jurisdiction.

8. Sec. 2789, Stats. 1898 (providing that where the plaintiff has not accepted defendant's offer of judgment, if he "fail to obtain a more favorable judgment he cannot recover costs, but must pay defendant's costs from the time of the offer"), applies only to costs accruing after the time of the offer and does not preclude the plaintiff in such a case from recovering his costs up to that time, if he would otherwise be entitled thereto.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.* They contended, *inter alia,* that the appraisal agreement was represented by the defendant to be, and construed and acted upon by the parties to it as, an award under and pursuant to the terms of the policy, hence having the effect in said policy provided, and that by estoppel of construction defendant is denied the right to claim for it any other effect. The defendant company may not, *by virtue* of the provision of the policy, *demand* an appraisal and award, and then, having secured an advantage in the adjustment, insist, *contrary to the terms* of the policy, that it is "binding and conclusive." *Chapman v. Rockford Ins. Co.* 89 Wis. 583; *Uhrig v. Williamsburgh C. F. Ins. Co.* 101 N. Y. 365; *Delaware & H. C. Co. v. Pa. C. Co.* 50 N. Y. 258; *Brock v. Dwelling House Ins. Co.* 102 Mich. 583; *Bradshaw v. Agricultural Ins. Co.* 137 N. Y. 137; *Kiernan v. Dutchess Co. M. Ins. Co.* 150 N. Y. 190. A party may be estopped as well by the *construction* placed upon a proposed contract as in any other particular. *Calkins v. State,* 13 Wis. 389; *Flint v. Babbitt,* 59 Vt. 190; *Hotchkiss v. Phœnix Ins. Co.* 76 Wis. 269; *Johnston v. N. W. L. S. Ins. Co.* 94 Wis. 117; *Mattoon v. Young,* 2 Hun, 559; *Continental L. Ins. Co. v. Chamberlain,* 132 U. S. 305; 2 May, Ins. §§ 498, 499, 502. An award independent

of the provision of the policy and having an effect contrary thereto, as claimed by the defendant, is void. Any contract or stipulation running counter to the provisions of the standard policy is void as against public policy. This is so whether the agreement or stipulation is found in the policy of insurance or is one made subsequent to a loss. *Thompson v. Citizens' Ins. Co.* 45 Wis. 388. In several of the states an award binding and conclusive has been held void as against public policy in that it ousts the court of jurisdiction. *Mentz v. Armenia F. Ins. Co.* 79 Pa. St. 478, 21 Am. Rep. 80; *German Am. Ins. Co. v. Etherton*, 25 Neb. 505; *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 47 Am. St. Rep. 711; *Ins. Co. of N. A. v. Bachler*, 44 Neb. 549; *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720; *Baltimore, O. & C. R. Co. v. Scholes*, 14 Ind. App. 524, 56 Am. St. Rep. 307. It may well be that one of the objects of the legislature in providing for an award *prima facie* in its effect was to obviate this objection and provide means that will, if fairly carried out, usually end the controversy, while it preserves to the court jurisdiction of the issue, and to the parties the right to invoke the aid of that jurisdiction if dissatisfied. *Fidelity & C. Co. v. Eickhoff*, 63 Minn. 170, 30 L. R. A. 586; *Fidelity & C. Co. v. Crays*, 76 Minn. 450. Plaintiff, a married woman, lacked capacity to enter into the agreement for appraisal, independent of the policy, having a binding and conclusive effect. Her sole authority is found in sec. 6295, How. Ann. Stats. Mich. This power cannot be extended beyond the constitutional and statutory limits. *Kenton Ins. Co. v. McClellan*, 43 Mich. 565; *De Vries v. Conklin*, 22 Mich. 255. It is material to note that the statute of Michigan (How. Ann. Stats. sec. 8474) unlike Wisconsin (Stats. 1898, sec. 3544) *denies* to a married woman the right to enter into a statutory award. This is not a statutory award, and the bare question of the extent of loss could not, at common law, be made the subject matter of submission.

Garr v. Gomez, 9 Wend. 649; Morse, Arbitration, 40. A mere evidentiary abstract fact is not property within the statute relating to married women; it cannot be sold, assigned, conveyed, or devised, nor can a contract concerning it be held one pertaining to property.

For the respondent there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. D. Van Dyke*. To the point that an appraisal by agreement of the parties, made after the fire, abrogates or takes the place of the appraisal provided for by the policy, they cited Ostrander, Insurance, § 266; Joyce, Insurance, § 3250; *Broadway Ins. Co. v. Doying*, 55 N. J. Law, 569; *Davis v. Atlas A. Co.* 16 Wash. 232; *Chandos v. Am. F. Ins. Co.* 84 Wis. 184–198; *Canfield v. Watertown F. Ins. Co.* 55 Wis. 419, 426; *Harrison v. German Am. Ins. Co.* 67 Fed. Rep. 577; *Connecticut F. Ins. Co. v. Hamilton*, 59 Fed. Rep. 258; *Schouweiler v. Merchants' M. Ins. Asso.* 11 S. Dak. 401; *Adams v. New York B. F. Ins. Co.* 85 Iowa, 6.

CASSODAY, C. J. It appears from the record that at the times mentioned the plaintiff's testatrix, Mollie Montgomery, owned two buildings at Iron Mountain, Michigan,— one a frame building and the other a brick building. On January 11, 1898, she held two policies of insurance against loss by fire on the frame building, which she had procured within the year immediately preceding,— one of $500 in the Northern Assurance Company of London, and the other of $500 in this defendant, *American Central Insurance Company of St. Louis;* and each of such policies permitted concurrent insurance to the amount of $2,000. She also held at the time mentioned four policies of insurance against loss by fire on the brick building, which she had procured within the year immediately preceding,— one for $1,000 in the Providence & Washington Insurance Company of Rhode Island, another for $1,000 in the Hanover Fire Insurance

Company of New York, another for $1,000 in the Scottish Union & National Insurance Company of Edinburgh, and another for $1,000 in the defendant, *American Central Insurance Company of St. Louis;* and each of such four policies permitted concurrent insurance to the amount of $5,000. On January 11, 1898, such buildings, and each of them, were burned by fire, if not destroyed.

The several policies, particularly the two issued by the defendant, *American Central Insurance Company*, contained this provision: "In the event of disagreement as to the amount of loss the same shall be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall be *prima facie* evidence of the amount of such loss." On or about February 7, 1898, the defendant's adjuster served notice and demand in writing on the testatrix, the body of which is as follows:

"As a result of our disagreement as to the loss and damage to your brick and frame buildings, and which was caused by the fire of January 11, 1898, I hereby demand an appraisal under such policies for such companies as I represent as adjuster, and such as are particularly inserted in the inclosed blanks. I inclose you herewith blank appraisal agreements, with duplicates, for both buildings, duly signed by myself as such adjuster, and herewith request that you sign and insert the name of your appraiser, keeping the duplicates and returning the originals to Mr. R. T. Miller, who delivers this letter with said blanks to you. A prompt response will facilitate the early taking up of the adjustment.

"Very truly yours, J. C. RAGSDALE, Adjuster."

The blank appraisal agreements so inclosed, between the

testatrix and the defendant, bore the same date and were signed on behalf of the defendant and three others of such companies, and were signed by the plaintiff's testatrix and returned to the defendant March 5, 1898; and the agreement as to the brick building is as follows:

"*Agreement for Submission to Appraisers.*

"It is hereby agreed by and between Mrs. Mollie Montgomery, party of the first part, and the *American Central Insurance Company of St. Louis*, and such other companies as shall sign and become parties to this agreement, party of the second part, that Robert Meyer and Thomas E. Pugh (and whenever either party demand it the two so chosen shall select a third person to act with them in case of disagreement) shall appraise the sound value of, and the loss and damage by fire of January 11, 1898, to, the property hereinafter named; and said persons so selected shall form a board of appraisers; and the award under oath of any two of such appraisers shall be *binding and conclusive* as to the sound value of, and loss and damage to, such property, and shall form a part of the preliminary proofs of loss required by said *American Central Insurance Company of St. Louis, Mo.*, under its policy No. 693,130, and also part of the proof of loss required by the policies of the said several other companies.

"The property upon which said sound value and loss and damage is to be appraised is, to wit: $1,000 on her two-story brick, metal-roof building, occupied on first floor for store purposes, and on second floor as dwelling by assured, situated on lot (10) of block (11), Original Plat, city of Iron Mountain, Mich.; $5,000 total concurrent insurance, including this, permitted. Attached to and forming part of the policy No. 693,130, *American Central Ins. Co.* McEnaney & Miller, Agents.

"It is understood and agreed that said appraisers shall take

into consideration the age, condition, and location of said property, and all other matters affecting the cash value thereof at the time of said fire; and that they may adjourn their meetings from time to time, and to such place or places as they may agree upon, to the end that they may arrive at a just and impartial award herein. Each party to pay its own appraiser and one half of the expenses of such third person. It is understood and agreed that this agreement for an appraisal, and the appraisal and award herein, shall not be construed under any circumstances as an admission of the validity of the said policies of said insurance companies on the property named, nor of the liability of said companies thereunder, nor as a waiver of any of the conditions of said policies of said companies.

"Dated and signed at Milwaukee this 7th day of February, 1898.

"[Signatures of *American Central Insurance Company* and the three other companies, by J. C. Ragsdale, adjuster, and of Mollie Montgomery.]"

The appraisers so agreed upon took the requisite oath March 17, 1898. On the same day the two appraisers so appointed by an instrument in writing "selected William H. Sweet as umpire." Thereupon such appraisers and umpire made their award in writing as to the brick building, as follows:

"*Award and Return of Appraisers.*

"To the *American Central Insurance Company of St. Louis* and the several other companies in interest:

"Having carefully and conscientiously examined, estimated, and appraised the sound value of, and the loss and damage by fire of the 11th day of January, 1898, to, the property belonging to Mrs. Mollie Montgomery agreeably to the foregoing appointment and declaration, we hereby report that we have, according to the best of our knowledge, skill, and judgment, estimated, appraised, and determined the sound

value to be $3,000, and the whole loss and damage to be $2,037.18, more particularly itemized in the schedule attached hereto, and marked 'A.'

"Dated and signed at Iron Mountain, this 19th day of March, 1898.

"THOMAS E. PUGH, [Seal.]
"ROBERT MEYER, [Seal.]
"W. H. SWEET, [Seal.]"

The blank appraisal agreement as to the frame building was substantially the same as the other, and agreed upon the same appraisers. Such appraisers took the requisite oath March 17, 1898, and by an instrument in writing "selected William H. Sweet as umpire" on the same day. Thereupon such appraisers and umpire made their award in writing as to the frame building, as follows:

"*Award and Return of Appraisers.*

"To the *American Central Insurance Company of St. Louis* and the several other companies in interest:

"Having carefully and conscientiously examined, estimated, and appraised the sound value of, and the loss and damage by fire of the 11th day of January, 1898, to, the property belonging to Mrs. Mollie Montgomery agreeably to the foregoing appointment and declaration, we hereby report that we have, according to the best of our knowledge, skill, and judgment, estimated, appraised, and determined the sound value to be $1,567.41, and the whole loss and damage to be $1,175.56, more particularly itemized in the schedule attached hereto, and marked 'A.'

"Dated and signed at Iron Mountain this 19th day of March, 1898.

"THOMAS E. PUGH, [Seal.]
"ROBERT MEYER, [Seal.]
"W. H. SWEET, [Seal.]"

The plaintiff's testatrix refused to abide by such awards, or either of them, and in July, August, and September, 1898, an action to recover for such loss and damage was com-

menced by Mollie Montgomery upon each of such policies against the company issuing the same. Such company in each case answered the complaint therein, and, among other things, pleaded such award as conclusively determining the loss and damage to the respective buildings. Such six actions were consolidated pursuant to the statutes (secs. 2609*a* and 2792, Stats. 1898).

On November 4, 1898, the *American Central Insurance Company of St. Louis* and the Northern Assurance Company of London, in the action against it on the policy issued by it on the frame building, each served notice on the attorneys for the plaintiff's testatrix, and thereby offered to allow judgment to be taken against it for its proportionate share of such award, to wit, "for $302.75, with costs."

On November 4, 1898, the *American Central Insurance Company of St. Louis* and the other three companies having issued policies on the brick building each served notice on the attorneys for the plaintiff's testatrix, and thereby offered to allow judgment to be taken against it for its proportionate share of such award, to wit, "for $420, with costs."

On December 12, 1898, such consolidated actions were tried, and at the close of the trial the jury returned answers to questions submitted to them to the effect (1) that the plaintiff's frame building was damaged by fire January 11, 1898, to the amount of $1,691.60; and (2) that the plaintiff's brick building was damaged by fire January 11, 1898, to the amount of $2,745.60.

On January 18, 1899, Mollie Montgomery died leaving a will, pursuant to which the plaintiff was appointed executor thereof, and thereupon he was substituted as plaintiff in this action.

On February 27, 1898, the court ordered judgment to be entered in favor of the plaintiff for the several amounts for which the several defendants offered to allow judgments to be taken against them, respectively, November 4, 1898, but

not including the costs therein offered, and also less all costs of the respective defendants since the time of such offer. From the judgment entered against the defendant the *American Central Insurance Company of St. Louis* for $722.75 in pursuance of such order, the plaintiff brings this appeal.

This case was before us and fully argued upon the merits last April, but was not decided because we were compelled to dismiss the appeal. 106 Wis. 543. It has now been reargued upon the merits. As there was no material disputed question of fact except as to the amount of damage to the respective buildings by reason of the fire, the trial court, in its discretion, submitted that question to the jury, with direction to return a verdict subject to the opinion of the court. Sec. 2857, Stats. 1898. The important question of law thus reserved was whether the respective awards as to the amount of such damage were "binding and conclusive" upon the parties, or merely *prima facie* and hence open for reinvestigation and determination by the jury. Such appraisers found and determined such loss and damage to the frame building to be $1,175.56, whereas the jury found the same to be $1,691.60. Such appraisers found and determined such loss and damage to the brick building to be $2,037.18, whereas the jury found the same to be $2,745.60. It is conceded that if the award as to the amount of the damage is binding and conclusive then the amount of damages adjudged is correct; but that if it is not binding and conclusive then the amount should be readjusted according to the verdict. As indicated, the clause of the policy quoted provided for the selection of two appraisers and an umpire to make an award of such loss on the respective buildings which should be "*prima facie* evidence of the amount of such loss."

1. It is contended that the defendant represented the appraisal agreements to be such as were provided for in the clause of the policy quoted, and that both parties so

construed and acted upon them; and hence that such construction and action was binding upon them. But there is nothing in the policy to prevent the parties from making the appraisal agreements which they did make; that is to say, agreements that the award under oath of any two of such appraisers should "be *binding and conclusive* as to the sound value of, and loss and damage to, such property, and shall form a part of the preliminary proofs of loss" required by the policies. We find no evidence of any such representation or construction as contended for by the plaintiff. The writings speak for themselves. The correspondence between the parties indicates that such writings were understood by both parties. There is no evidence tending to impeach either of the awards, or the agreement upon which either award is based, for fraud or mistake. In the absence of fraud or mistake Mollie Montgomery was conclusively presumed to know the contents of the appraisal agreements, and must be deemed to have entered into such agreements understandingly. *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 603; *Herbst v. Lowe*, 65 Wis. 321; *German Bank v. Muth*, 96 Wis. 344.

2. It is contended that the award is void because it is contrary to the policy of the law of Michigan as evinced by the standard policy of that state. The chapter of the Michigan statute cited by counsel provided for the appointment of commissioners, whose duty it should be "to adopt a standard form of fire insurance policy for use" in that state, and indicated therein the general results to be accomplished by such policy, and prohibited insurance companies from using any other form, and provided that "every policy or contract made or issued contrary to the provisions of *this act* shall be void." 1 How. Ann. Stats. ch. 137, secs. 4344, 4345, 4349. A somewhat similar enactment in this state was held void as an attempt to delegate legislative power. *Dowling v. Lancashire Ins. Co.* 92 Wis. 63. We find nothing in the

act nor the supplement to the act in relation to appraisal agreements. 3 How. Ann. Stats. (Supp.), ch. 137. Besides, the prohibition in the act relates to some different contract or policy of insurance. 1 How. Ann. Stats. ch. 137, sec. 4349. It has no reference to the adjustment of losses under a policy of insurance. It is very obvious that whenever a loss occurs by fire and a liability for the loss attaches under the policy, the entire relation beween the parties is changed from that of insurer and insured to that of debtor and creditor. 2 Wood, Ins. § 361; *Dogge v. N. W. Nat. Ins. Co.* 49 Wis. 501; *Alkan v. N. H. Ins. Co.* 53 Wis. 136; *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 70; *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105. It is enough to say on this question that there is nothing in the policy in the case at bar to preclude the parties from settling between themselves or arbitrating the amount of such loss or damage. In the case last cited it is said in the opinion of the court, in effect, that the capacity of the parties to contract after the loss could not be restricted by the policy. To the same effect, *Renier v. Dwelling House Ins. Co.* 74 Wis. 89, 98.

3. Counsel contend that Mollie Montgomery, being a married woman at the time, had, under the laws of Michigan, no power or capacity to make the appraisal agreements mentioned. Counsel will hardly claim that she did not have capacity to contract for the insurance. The statutes of that state expressly authorized married women to acquire and hold property, and to sell, transfer, mortgage, convey, devise, and bequeath the same, or make contracts in relation thereto, "in the same manner and with the like effect as if she were unmarried;" and suits may be brought by and against her, in relation to her property, the same as though she were unmarried. 2 How. Ann. Stats. secs. 6295, 6297. The moment the loss occurred by reason of the fire, she had a claim or right of action against the company, which constituted a part of her separate estate; and under the statute

cited there would seem to be no doubt but that she could make the appraisal agreements as steps towards the settlement of such controversy. *Gillespie v. Beecher*, 94 Mich. 374; *Feather v. Feather's Estate*, 116 Mich. 384, 386.

4. It is conceded that the award in question is not a statutory award, as prescribed in that state. 2 How. Ann. Stats. ch. 292, secs. 8474–8496. But it seems to be settled in Michigan, as well as in this and other states, that such statutory provisions did not preclude parties from entering into a binding agreement for submitting their controversies to arbitration as at common law, or from enforcing the award of such common-law arbitrators by an action at law. *Clement v. Comstock*, 2 Mich. 359, 361; *Bush v. Davis*, 34 Mich. 190, 196, 198; *Galloway v. Gibson*, 51 Mich. 135; *Cady v. Walker*, 62 Mich. 157. In this last case it was said by CAMPBELL, C. J., that "a parol submission to arbitration is good at common law, and is not forbidden by any statute." Page 159. This court held otherwise at an early day. *Allen v. Chase*, 3 Wis. 249. But that case was expressly overruled soon after. *Darling v. Darling*, 16 Wis. 644. In this last case it was expressly held that an award not attested as required by the statute, but otherwise unobjectionable, was good as a common-law award, and might be enforced by action, citing numerous adjudications in New York, from which our statute was borrowed, in support of the proposition.

In the case at bar the policy itself provided that, in the event of any disagreement as to the amount of the loss, the same should be ascertained by appraisers to be selected as prescribed; and that the award in writing of any two of them should "be *prima facie* evidence of the amount of such loss." As indicated in the statement of facts, after the fire the parties by agreement in writing modified such agreement in the policy so that "the award under oath of any two of such appraisers" should "be binding and conclusive as to the sound value of, and loss and damage

to, such property," and should "form a part of the preliminary proofs of loss required" by the company. It is contended that such binding and conclusive determination is contrary to public policy. But, in the language of Chief Justice CAMPBELL in one of the cases cited: "All that the parties desired on the merits has been accomplished. To hold that they should now be compelled to litigate over again before the courts what they desired to avoid litigating, would be to trifle with the substantial interests of parties, and to discourage amicable settlements, which the law ought to favor." *Galloway v. Gibson*, 51 Mich. 135. To encourage such methods of settlement, courts have liberally construed such awards with a view to give them effect and to accomplish the ends of justice and the intentions of parties. *Bush v. Davis*, 34 Mich. 190; *Bancroft v. Grover*, 23 Wis. 463; *Call v. Ballard*, 65 Wis. 187, 190; *Wood v. Treleven*, 74 Wis. 577, 580.

Counsel contend that such agreement to make the award binding and conclusive was without consideration and therefore void. But this court has frequently decided that a written agreement may subsequently be modified by the parties, even by an oral agreement; and that such modification need not rest upon any new consideration. *Brown v. Everhard*, 52 Wis. 205; *Kelly v. Bliss*, 54 Wis. 191; *Bingham v. Ins. Co. of N. A.* 74 Wis. 503; *Lynch v. Henry*, 75 Wis. 634; *Kingman & Co. v. Watson*, 97 Wis. 608. This is a mere reiteration of the rule stated long ago by Lord DENMAN, C. J., when he said: "The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it." *Stead v. Dawber*, 10 Adol. & E. 57, 66. This court has expressly held that the decision of arbitrators or appraisers chosen pursuant to an insurance policy to determine the amount of a loss is final and conclusive when so provided in the contract of insurance. *Chandos v. Am. F. Ins. Co.* 84 Wis. 184. A case more

similar to the case at bar has recently been decided in New Jersey, wherein it was held that, "When an appraisement of damages is offered to prove the loss by fire in an action on a policy of insurance, and is objected to on the ground that it was not made as required by the policy, the objection is rightly overruled if it appear that by an agreement made after the fire the parties superseded the appraisement clause of the policy." *Broadway Ins. Co. v. Doying*, 55 N. J. Law, 569.

Counsel further contend that such appraisal agreement ousted the courts of jurisdiction and was therefore void as against public policy, within the principles stated by Mr. Justice MARSHALL in the recent case of *Fox v. Masons' F. A. Asso.* 96 Wis. 394, 395. But it is there expressly stated in the opinion that "agreements to arbitrate special matters, such as, under an insurance policy, the amount of the loss, something that does not go to the whole groundwork of the controversy, have been universally sustained." Numerous authorities are there cited in support of that proposition, which need not be here repeated. See, also, *Hamilton v. Liverpool, L. & G. Ins. Co.* 136 U. S. 242.

We must hold that the awards were binding and conclusive.

5. Counsel for the plaintiff contend that, even if the awards were conclusive, yet the judgment is erroneous because it refused to allow costs to the plaintiff incurred up to the date of the tender of judgment by the defendant. In support of such contention counsel rely upon the wording of the statutes, which declare, in effect, that "costs shall be allowed of course to the plaintiff in an action in the circuit court . . . on contract when the plaintiff shall recover one hundred dollars or more" (subd. 6, sec. 2918, Stats. 1898); but that "costs shall be allowed of course to the defendant" in the class of actions mentioned in that section, "unless the plaintiff be entitled to costs therein" (sec. 2920). Since this

action is upon contract and the plaintiff did recover more than $100, it is obvious that the plaintiff is entitled to full costs unless the right to such full costs is taken away by some other statute. The defendant contends that, as the plaintiff failed to accept the defendant's offer, made November 4, 1898, to allow judgment to be taken against it for its proportionate share of the award, such offer must be "deemed to be withdrawn;" and that, since the plaintiff failed to recover a more favorable judgment than thus offered, he is precluded from recovering any costs by sec. 2789, Stats. 1898. The last clause of that section is that, "if the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay defendant's costs *from the time of the offer*." It will be observed that, while this statute required the plaintiff to pay the defendant's costs from the time of the offer, yet it is silent as to the costs which had accrued up to the time of making the offer. It is contended that that section did not take away the plaintiff's right to costs thus given by sec. 2918, except as to such costs as accrued subsequent to the time of making the offer. But the defendant contends, and the trial court held, that it did take away such right; and it is claimed that this court has so decided. *Collins v. Lowry*, 78 Wis. 329. That action was for the unlawful and wrongful conversion of a stock certificate, which, pending the action, was surrendered and filed in court for the use and benefit of the plaintiff; and the defendant offered to allow the plaintiff to take judgment for nominal damages, with costs and disbursements, which the plaintiff declined to accept. At the close of the trial the plaintiff obtained a verdict for six cents damages by direction of the court. It is said in the opinion of the court in that case that: "To entitle the plaintiff to costs in such an action, it was necessary for him to recover at least fifty dollars damages. Subd. 5, sec. 2918, R. S. Since the plaintiff was not entitled to costs, it follows that the defendant was. Sec.

2920, R. S." *Collins v. Lowry*, 78 Wis. 333. It is true it was further said in that case, in effect, that the plaintiff therein was also precluded from recovering any costs after the offer by reason of the provisions of sec. 2789, R. S. 1878. But, as indicated, that was with reference to a case where the plaintiff was not entitled to any costs, even in the absence of such offer of judgment and the section last cited. *Parroski v. Goldberg*, 80 Wis. 343. In a later case, where the defendant offered judgment, with costs, which the plaintiffs declined to accept and then failed to recover a more favorable judgment, this court said: "We perceive no legal objection to allowing plaintiffs their costs in the circuit court accruing before such offer." *Chicago & N. W. R. Co. v. Groh*, 85 Wis. 648.

Counsel for the defendant and the trial court call attention to the difference between the provisions of sec. 2789, Stats. 1898, above quoted, and the corresponding section of the New York Code, as indicated in *Lynk v. Weaver*, 128 N. Y. 171, 175, which reads: "If the plaintiff fails to obtain a more favorable judgment, he cannot recover costs *from the time of the offer*, but must pay costs from that time." But the clause of sec. 2789 above quoted was copied literally from sec. 385 of the old Code of New York. Wait's Ann. Code, 732; Voorhies' Code, pp. 597, 598. Under that section as it then stood, it was held in New York as early as 1850 that "a defendant against whom a judgment is obtained for a less amount than he offered, in writing, to allow judgment to be taken against him under sec. 385, is entitled to costs against the plaintiff from the time of the offer." *McLees v. Avery*, 4 How. Pr. 441. In that case Mr. Justice WILLARD, in behalf of the court, said, "The plaintiff was entitled to costs up to the time when the offer was made." To the same effect is *Keese v. Wyman*, 8 How. Pr. 88. The language of sec. 2789 quoted above is found in the Code of Civil Procedure of California (sec. 997), and is there "con-

strued as applying only to costs accruing after the time of the offer," and it is held that "the plaintiff may recover costs accruing in his favor before an offer of judgment by the defendant, though he may recover a less favorable judgment than was offered." *Douthitt v. Finch*, 84 Cal. 214. See, also, 15 Ency. of Pl. & Pr. 50. We must hold that it was error to refuse costs to the plaintiff up to the time of the offer of judgment.

By the Court.—The judgment of the circuit court is affirmed in all things except in so far as it refused costs to the plaintiff up to the time of the offer of judgment, and to that extent it is reversed, and the cause is remanded with direction to allow such costs to the plaintiff and to modify the judgment accordingly. No costs are allowed to either party in this court, except that the defendant must pay the clerk's fees.

THE STATE EX REL. W. G. TAYLOR COMPANY VS. ELLIOTT, Circuit Judge.

108 163
116 255
d116 256

October 30 — November 16, 1900.

Mandamus: *Vacation of order: Change of venue.*

Mandamus to compel a circuit judge to vacate an order changing the venue of an action is denied, complete and direct relief being obtainable, if relator is entitled to it, upon *certiorari*.

MOTION for an alternative writ of *mandamus*. Denied.

F. H. Remington, for the relator.

DODGE, J. Application for alternative writ of *mandamus* commanding the circuit judge of Milwaukee county to set aside and vacate an order entered by that court changing the venue of a certain action. The relief sought is properly obtainable, if at all, on *certiorari*. Existence of an

order made contrary to law is the only claimed infringement of relator's rights, and the only relief he seeks is the extinguishment of that order. The judgment upon *certiorari* is either affirmance or reversal of such order; and the latter, if relator is entitled to it, is complete and direct relief. Counsel has apparently been misled as to his remedy by the fact that a command to vacate certain orders was included in the *mandamus* issued in *State ex rel. Fourth Nat. Bank v. Johnson*, 105 Wis. 164. But in that proceeding the principal relief sought and granted was a mandate to enter certain specified orders, and the vacation of others was merely ancillary and to enable the commanded order to take effect. For these reasons the motion for an alternative writ of *mandamus* is denied.

By the Court.— So ordered.

EDWARDS, Appellant, vs. H. B. WAITE LUMBER COMPANY, imp., Respondent.

October 30 — November 16, 1900.

Lien on logs: Hire of horses.

Although horses were rented for the express purpose of being used in work of a lienable nature upon logs, the owner is not entitled to a lien for their hire, under sec. 3329, Stats. 1898, unless they were used and worked by him or by some person as his agent or servant.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

Plaintiff furnished six teams of horses to defendant Mellen Lumber Company under a written contract reciting that the party of the first part is the owner of six teams of horses; that the party of the second part was about to haul a large quantity of logs, in which it will require the use of

teams; therefore party of the second part agrees to pay party of the first part for the use of his teams the sum of $30 a month for each team, "as payment for the services of said teams of horses in hauling and delivering said logs known as the Shaw Tannery Company logs." The contract also fixed a price and gave an option of purchase of said horses to said party of the second part, under which all sums earned by said teams under the contract would be applied upon the purchase price. The Mellen Lumber Company took the horses to their base of operations on February 28th, and returned them to plaintiff July 8, 1898, during which period, except for some idle time, the horses were worked in hauling the logs described, and the amount due for the time they were so retained under the contract was $780. The actual days on which the horses were worked during said period, deducting for Sundays and disabilities, amounted to $369.37. Personal claim was made against the Mellen Lumber Company, and a lien was demanded upon lumber produced from said logs and purchased by the defendant *Waite Lumber Company* in good faith and without notice, prior to the attachment. Personal judgment was rendered against the defendant Mellen Lumber Company, but the claim for lien was dismissed. Plaintiff appealed from the latter portion.

Ben S. Smith, for the appellant.

For the respondent there was a brief by *G. N. Risjord*, of counsel (*Tomkins & Merrill*, attorneys), and oral argument by *Geo. F. Merrill.*

DODGE, J. The liberal construction properly accorded to the log lien statutes was given full effect in *Hogan v. Cushing*, 49 Wis. 169, where it was held that the labor in cutting or hauling logs might be done not only by the lien claimant but by his servants or agents, and that the lien might extend to the value not only of the personal labor of the claimant

and his servants but so as to include the value of that labor as enhanced by the use of his teams. Further extension of construction was denied when an attempt was made to enforce lien for labor of the claimant's ox not used by himself or his agent or servant, but hired to another (*Lohman v. Peterson*, 87 Wis. 227), and when lien was claimed for the value of the use of claimant's machinery when not operated by himself or his agents, but hired to another (*McAuliffe v. Jorgenson*, 107 Wis. 132).

The present case obviously falls within the reasoning of the latter decisions. The statute (Stats. 1898, sec. 3329), according to its strict terms, would justify a lien only for labor or services done or performed by the claimant himself. Certainly, due liberality of construction has been accorded in holding that it may include labor or services done by another, and such construction can only be sustained by application of the maxim *Qui facit per alium facit per se.* This maxim, however, is limited to acts done through another *person*, and cannot justify the idea that one can confer agency upon animals or machinery so that work effected by them shall be deemed to be labor or services done by him, where such animals or apparatus are not used and operated by the claimant or by some person as his agent or servant. The circuit court rightly held that the plaintiff was entitled to no lien for the hire of his horses when rented to another, although rented for the expressed purpose of enabling that other to perform work of a lienable character.

By the Court.— Judgment affirmed.

EMERSON and another, Respondents, vs. SCHWINDT and another, Appellants.

108 167
s114 125
s114 126

October 30 — November 16, 1900.

Land contract: Sale by receiver of vendor: Foreclosure by assignee: Counterclaim against receiver: Conveyance by assignee: Title: Defect of parties: Demurrer.

1. The receiver of a corporation, under an order of the court, sold a land contract and notes given for the deferred payments thereon, no condition accompanying the sale. Subsequently assignees of the purchaser at such sale commenced an action to foreclose the land contract, but did not make the corporation or the receiver a party. *Held*, that the purchaser at the receiver's sale took title to the contract and notes free from claims and debts arising out of the receivership, and that the defendant could not maintain a counterclaim for damages for breach, by the receiver, of a contract for a general retainer, or for legal services performed for the receiver.
2. A court of equity should not compel the vendee in a land contract to accept, as a fulfilment of the contract, a conveyance from the vendor's assignee of the contract while the legal title remains in the vendor, who is not made a party to the action,— even though the objection that there is a defect of parties is not properly taken.
3. The rule that a vendee who has gone into possession under a land contract cannot retain possession and refuse to pay the purchase money on the ground that the vendor's title is defective, does not apply to the objection that a conveyance from the vendor's assignee of the contract does not convey the legal title.
4. A demurrer on the ground that there is a defect of parties, which fails to state whether the defect consists in the omission of a plaintiff or a defendant or to name the person who should be made a party, is insufficient under secs. 2649, 2651, Stats. 1898, to raise that question.

APPEAL from a judgment of the circuit court for Price county: A. J. VINJE, Judge. *Reversed.*

H. C. Peters, for the appellants.

For the respondents there was a brief by *George H. Singleton* and *James O'Leary*, and oral argument by *Mr. O'Leary*.

CASSODAY, C. J. This is an action to foreclose a land contract, commenced September 17, 1897. It is alleged in the complaint, in effect, that some time prior to August 22, 1894, the Jump River Lumber Company, a corporation organized under the laws of this state, being the owner of the lot of land described and in possession thereof, entered into a parol agreement with the defendant *G. E. Schwindt* to sell and convey the same to him, and he at the same time agreed to purchase the lot, and in pursuance of such agreement was let into the possession thereof; that upon the day and year named one W. J. Hartzell was duly appointed receiver of all and singular the property of that corporation in an action in the United States court against it, wherein one George W. Van Dusen was plaintiff; that Hartzell thereupon qualified as such receiver; that thereupon, by an order of the United States court, Hartzell, as such receiver, was duly granted leave and was authorized to make contracts in settlement of claims, and to institute and prosecute all such suits, actions, and proceedings as might be necessary in the execution of his trust; that November 27, 1894, Hartzell, as such receiver and in the name of the corporation, in pursuance of such parol contract, entered into a written agreement with the defendants, whereby he agreed to sell and convey the lot to the defendants for $600 and interest at eight per cent., one third payable April 17, 1895, 1896, and 1897, respectively, and each secured by the promissory note of the defendants, and defendants agreed to pay all taxes thereon subsequently to January 1, 1894; that Hartzell therein agreed in behalf of the corporation and its successors that, upon such payments being made, it would cause to be executed and delivered to the defendants "a good and sufficient deed in fee simple of the premises above described, free and clear of all legal liens and incumbrances, except" the taxes mentioned; that March 10, 1896, Hartzell, as receiver, was ordered by the United States court to "sell all

debts, claims, and demands held by him for" the corporation "against any and all persons, as well as all other property of" the corporation, "then in his hands, at public auction," April 21, 1896, at the place therein named; that at the time and place so named the written land contract, together with the three notes of the defendants mentioned, then in Hartzell's possession as such receiver, were by him duly sold pursuant to such order, and bid in and purchased at such sale by one E. T. Rollins; that such sale was confirmed May 11, 1896; that June 5, 1896, Hartzell, as receiver, indorsed the three notes without recourse, and delivered them and an assignment of the land contract to Rollins, which assignment was duly recorded; that June 2, 1897, Rollins, for value, sold and assigned the three notes and the land contract to the plaintiffs, which assignment was duly recorded; that Rollins and wife at the same time executed a "special warranty deed of the premises" to the plaintiffs duly acknowledged so as to entitle the same to be recorded; that the plaintiffs are the owners of the premises and all the right, title, and interest of the corporation in the notes and land contract; that the defendants failed to pay anything on any of the notes, or any taxes; that the corporation, during its existence, was willing to perform the land contract; that Rollins, during his ownership, was willing to so perform; that the plaintiffs were willing to perform and convey the lot to the defendants on being paid; that the defendants refused to perform the contract, but retained possession and refused to give it up. A strict foreclosure of the land contract is demanded.

The defendants demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action, and that there was a defect of parties. That demurrer was overruled February 15, 1898. The defendants, by way of answer, alleged, in effect, that there were to be indorsed as payments on the land contract one item of $40, and another of $50, by reason of certain dealings of the de-

fendant as an attorney at law and the corporation and its receiver as therein stated. The answer also set up a counterclaim for $3,500 damages for the receiver's breach of contract for a general retainer and agreement to give him all his legal business as receiver, and also a second counterclaim for $610 for legal services performed for the receiver at his special instance and request.

The plaintiffs, by way of reply, admitted one payment of $54.98 by way of account August 23, 1894, and another of $49.44 by way of account May 1, 1895, and also the payment of interest to May 1, 1895; and further alleged that May 1, 1895, Hartzell, as receiver, and the defendant had a full and complete settlement, and that Hartzell paid the defendant in full for all claims for all services, and on that day took his receipt for such payment of all demands for services to that date; and further denied each and every allegation of such answer not therein admitted, controverted, or explained.

At the close of the trial the court found, in effect, that all allegations of the complaint and the reply were true; that the answer did not state facts sufficient to constitute a counterclaim; that there was due to the plaintiffs on the notes and land contract $650.96 for principal and interest; that September 18, 1897, the plaintiffs paid, to redeem the land from taxes for the years 1894, 1895, and 1896, $63.44,—making in all $714.40; and as conclusions of law that the plaintiffs were entitled to a judgment for strict foreclosure as prayed. Judgment was thereupon entered accordingly, and, among other things, to the effect that if the defendants failed within six months from December 5, 1898, to "accept a good and sufficient deed in fee simple of the premises *from the plaintiffs*, and pay the sum of $714.40, with interest" thereon from December 5, 1898, with $91.98 costs, "then the defendants and all persons claiming under them by virtue of the contract . . . be adjudged to have abandoned and given up all right, title, and interest in and to the land and premises described."

From that judgment the defendants appeal.

The two payments alleged in the answer to have been made seem to be more than admitted in the reply. Neither of the counterclaims alleged in the answer seems to have any merit. Neither the Jump River Lumber Company nor Hartzell as receiver or otherwise is made a party to this action. A counterclaim "must be one existing in favor of the defendant and against a plaintiff between whom a several judgment might be had in the action." Stats. 1898, sec. 2656. The plaintiffs obtained title to the notes and land contract through a sale made by the receiver under an order of the court. No conditions appear to have accompanied that sale. It does not appear that Hartzell was authorized, as such receiver, to employ the defendant as alleged; but, even if he was so authorized, yet he would only be entitled to pay from assets held by the receiver when allowed by the federal court. High, Receivers, §§ 797–799; 20 Am. & Eng. Ency. of Law, 189. Upon the facts alleged in the complaint, Rollins, as purchaser of the notes and land contract at the receiver's sale, took the title thereof free from claims and debts arising out of the receivership. 20 Am. & Eng. Ency. of Law, 152, 153. Manifestly, the defendant has no counterclaim against these plaintiffs for such legal services; much less for such breach of contract for retainer.

The more important question is whether the record shows that the plaintiffs are entitled to the relief here adjudged. The plaintiffs trace their title to the notes and land contract from the Jump River Lumber Company through the receiver's sale and from the purchaser at that sale to themselves. The complaint further alleges that the plaintiffs are the owners of all the right, title, and interest which the Jump River Lumber Company had in the notes and the land contract; and that they are now the owners of the premises, subject to the claim of the defendants under and by virtue of that contract. Such allegations, when construed together, are simply to the effect that the plaintiffs are merely

the equitable owners of such premises by virtue of having acquired the title to the notes and land contract as alleged. There is no finding of the court, nor allegation in the complaint, nor evidence in the record that the Jump River Lumber Company ever parted with the legal title to the land, or that the receiver ever sold, or offered to sell, the legal title to the land to any one, much less to Rollins, from whom the plaintiffs acquired the notes and land contract. For aught that appears, the legal title to the land is still outstanding in the Jump River Lumber Company, or is subject to be sold by the receiver under an order of the court. And yet the judgment requires the defendants, on payment of the amount due, to accept a deed from the plaintiffs. Had the plaintiffs, prior to the entry of such judgment, brought into court a good and sufficient deed, conveying in fee simple the title to the premises which the Jump River Lumber Company formerly owned, free and clear of all legal liens and incumbrances, as required by the land contract, running to the plaintiffs or to the defendants, and had the judgment required the delivery of such deed, as well as the deed of the plaintiffs, upon payment by the defendants of the amount due, with costs, then the case might have been fully determined without the presence as parties of the Jump River Lumber Company or Hartzell as receiver.

It is true, as contended by the plaintiffs, that the ground of demurrer for "a defect of parties" is not in compliance with the statutes. Stats. 1898, secs. 2649, 2651. It does not even state whether such defect is in the omission of a party plaintiff or defendant; much less does it name the person or persons who should be made parties. Id., and notes. So the statute provides that, if such objection is not taken as prescribed, "the defendant shall be deemed to have waived the same." Sec. 2654. But the statute also provides that, "when a complete determination of the controversy cannot be had without the presence of other parties . . . the court shall order them to be brought in." Sec. 2610. This

language seems to be mandatory. *Mahr v. Norwich Union Soc.* 127 N. Y. 452, 459; *Galusha v. Galusha*, 138 N. Y. 281; *First Nat. Bank v. Shuler*, 153 N. Y. 169, 170. Certainly, a court of equity should not compel the vendee in a land contract to accept of a conveyance from the vendor's assignee of the contract while the legal title remains in the vendor, who is not made a party to the action. For rulings of this court upon propositions similar in principle, see *Call v. Chase*, 21 Wis. 511; *Church v. Smith*, 39 Wis. 492; *Wilde v. Paschen*, 67 Wis. 90, 95; *Edwards & M. L. Co. v. Mosher*, 88 Wis. 677; *Bartz v. Paff*, 95 Wis. 100, 108. Thus, in one of the cases cited it was held, in effect, that the vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money; and, if he transfers to another the purchaser's notes for the whole of the unpaid purchase money, he will continue to hold such legal title in trust as security for his assignee; and on default of the vendee the assignee will be entitled to a strict foreclosure as against the vendee, and also a judgment against the vendor, compelling him to execute the trust in an appropriate manner. *Church v. Smith, supra; Bartz v. Paff, supra.*

Counsel for the plaintiff contended that the defendants, having gone into possession under the land contract, cannot retain such possession and refuse to pay the purchase money on the ground that the vendor's title was defective; and they cite authorities to that effect. *Taft v. Kessel*, 16 Wis. 273; *McIndoe v. Morman*, 26 Wis. 588; *Diggle v. Boulden*, 48 Wis. 477; *Lacy v. Johnson*, 58 Wis. 414. See, also, *Fulkner v. Woodard*, 104 Wis. 610. The difficulty with the contention is that the defendants are not claiming that the title of the Jump River Lumber Company was defective, but merely that the judgment does not provide for giving that title to the defendants upon payment of the amount due, as required by the land contract.

We must hold that the judgment is unsupported by the evidence in the record.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to allow the plaintiffs, if they can, to present to the court a conveyance of the legal title to the effect as mentioned in the opinion, or that the other parties necessary to a complete determination of the controversy be brought in and the rights of all parties be determined by the judgment to be entered, and for further proceedings in accordance with this opinion.

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THE STATE EX REL. FUNKE, Appellant, vs. BURGESON and others, Supervisors, Respondents.

October 30—November 16, 1900.

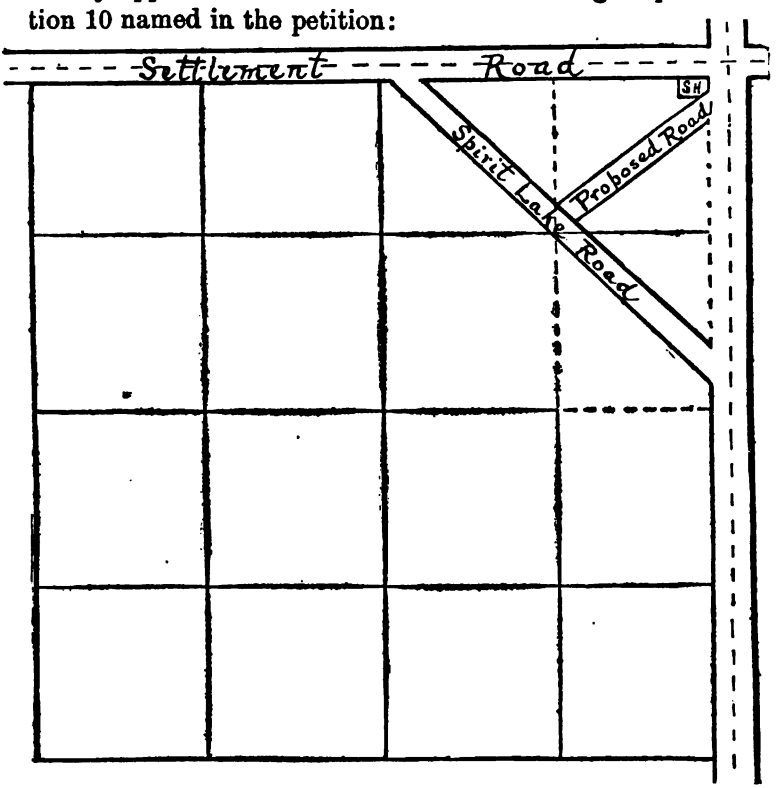
Highways: Petition for alteration: Laying out new road: Uncertainty in description.

1. Under secs. 1265–1269, Stats. 1898 (authorizing the supervisors of a town, upon proper petition and notice, to "lay out, alter, widen or discontinue any highway"), a new and separate highway with different termini cannot be laid out upon an application to alter an existing highway.
2. The order altering a highway must, under sec. 1269, Stats. 1898, contain an intelligible description of it as altered.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action of *certiorari* brought to set aside certain proceedings of the town board of supervisors of the town of Hill, Price county, purporting to alter two certain highways in said town. The petition for the alteration of the highways was signed by the requisite number of freeholders, and the alteration of highways desired was described in said petition as follows: "To alter a highway in said town known as the Settlement road, and passing at the place to be so

altered along the north section line of section 10, township 34 north, of range 2 east, the same being 4 rods wide, and a road on the east section line of said section 10 — 34 — 2 east, as follows: Beginning at a point 16 rods south of the northeast corner of section 10, township 34, range 2 east; thence southwesterly 86½ rods to a point on the Spirit Lake road 13 rods east from ⅛ line where said Spirit Lake road crosses the ⅛ line 12 rods north from the sw ⅛ post of the ne ¼ of the ne ¼ of section 10, township 34 north, of range 2 east,—all of the same passing through the northeast quarter of the northeast quarter, section 10, township 34 north, of range 2 east, in Price county, Wisconsin." The situation will more clearly appear on examination of the following map of section 10 named in the petition:



The road marked "Settlement Road" upon the north side of section 10 and the road bearing no name upon the east side of section 10 are the roads which were expected to be altered by the proceedings upon the petition, and the diagonal road marked "Proposed Road" upon the map was an entirely new highway running through the plaintiff's lands, by the laying out of which it was expected to alter the first-named roads. The supervisors acted upon the petition in accordance with the statute, and finally made an order purporting to alter said highways in the exact terms of the petition.

The relator was the owner of the east half of the northeast quarter of the section, through which the new road ran; and he refused to accept the damages awarded him, and brought this action, claiming that there had been no legal alteration of any highway. Return having been duly made to the writ by the board of supervisors, the circuit court affirmed the proceedings of the board, and the relator appealed.

For the appellant the cause was submitted on the brief of *M. Barry.*

H. C. Peters, for the respondents, contended, *inter alia*, that the description is sufficient. 15 Am. & Eng. Ency. of Law (2d ed.), 361; *Hyde Park v. County Comm'rs of Norfolk Co.* 117 Mass. 416; *Taft v. Comm.* 158 Mass. 526; *Jackson v. Rankin*, 67 Wis. 285; *State ex rel. M., L. S. & W. R. Co. v. O'Connor*, 78 Wis. 282; *Neis v. Franzen*, 18 Wis. 537. If the road in the case at bar is such an independent separation from the old road that it cannot be an alteration, this proceeding ought to stand so far as to establish it as a new road. *Bliss v. Deerfield*, 13 Pick. 102, *Comm. v. County Comm'rs of Berkshire Co.* 8 Pick. 343; *Raymond v. County Comm'rs of Cumberland Co.* 63 Me. 112.

WINSLOW, J. The statutes authorize the supervisors of a town, upon proper petition and notice, "to lay out, alter,

widen or discontinue any highway," and require them to incorporate in their order "a description of the highway so laid out, altered, widened or discontinued." Stats. 1898, secs. 1265–1269, inclusive.

It is evident from the terms of the statute that the alteration of a highway is an entirely different thing from the "laying out" or the "discontinuance" of a highway. The *alteration* of a highway, as the word itself indicates, means the change of course of an existing highway, leaving it substantially the same highway as before, but with its course in some respects changed. While an *alteration* will necessarily require the condemnation of additional lands, and will result in the vacation or discontinuance of that part of the former highway not included within the limits of the altered course, the proceeding to alter a highway does not thereby become a proceeding to lay out a new highway or to discontinue an old one. The proceedings are separate and distinct, and intended so to be; and a new and separate highway cannot be laid out upon an application to alter an existing highway. *Comm. v. Cambridge*, 7 Mass. 158; *Vedder v. Marion Co.* 28 Oreg. 77. In the present case it is plain that the attempt made was to lay out a new and separate highway with different termini, under the claim that it was simply an alteration of two existing highways.

Furthermore, it is impossible to tell from the description in the petition and order what parts of the existing highways are intended to be altered. The statute requires a description of the highway so altered to be incorporated in the order, so that in this respect also the proceedings fail to comply with the statute.

By the Court.—Judgment reversed, and action remanded with directions to reverse the proceedings of the supervisors.

VAN DUSEN, Respondent, vs. HINZ and another, imp., Appellants.

October 30 — November 16, 1900.

Debtor and creditor: Fraudulent conveyances: Husband and wife.

Nine years after giving to his wife, for money borrowed from her, a note for $2,300, bearing ten per cent. interest, a husband purchased land for $6,000 and applied the amount due on the note in part payment therefor, furnishing the rest of the purchase price himself. He took the title in his own name, treated the property as his own for seven years, and then, being insolvent, conveyed it to his wife without consideration. He had previously transferred to her other property and money to a considerable amount, and she was assisting him in the effort to keep his property out of the reach of his creditors. On the strength of his ownership of the land he had obtained credit from plaintiff, and the conveyance to the wife was made while plaintiff's action against him on the debt was pending, and was not recorded until the day before the entry of plaintiff's judgment. It was claimed that the land was originally purchased with the understanding that the husband should take the title and convey to the wife at any time she desired it. *Held*, that the conveyance to the wife was properly adjudged void as to creditors. *Martin v. Remington*, 100 Wis. 540, distinguished.

APPEAL from a judgment of the circuit court for Ashland county: FRANK M. FISH, Judge. *Affirmed.*

This is an action to set aside a conveyance made by the defendant *W. F. Hinz* to his wife, *Otillie Hinz*, as fraudulent, and to subject the property to an execution upon a judgment obtained by the plaintiff against said defendant. The evidence and findings show that in 1876 *Hinz* borrowed money of his wife, and in 1878 they had a settlement, when he gave her a note for $2,300, bearing ten per cent. interest. In 1887 he purchased the property in suit for $6,000, and it is claimed and found by the court that the amount due upon this note was applied in part payment, and the balance was furnished by the husband. The title was taken in his name, and so

remained until June 13, 1894, when a conveyance was made to Mr. Graf, and by him to the defendant *Otillie*. No consideration was paid, and the deed was not recorded until October 3, 1894,— the day previous to the entry of plaintiff's judgment against the husband. In the meantime *Hinz* had treated the property as his own,— paid taxes thereon, represented to others that he owned it, and, with his wife, executed a mortgage thereon to secure his own debt. At the time of the conveyance to his wife, *Hinz* was hopelessly insolvent, and was adopting sundry methods to shift his property out of his hands to avoid his liabilities and keep his property out of the reach of his creditors. Plaintiff's action was commenced in 1893, and was pending while these various transactions were being carried on. After the title was conveyed to the wife, two mortgages were given on the property, which are mentioned in the findings and found to be held by innocent hands. The trial court held that the conveyance to the wife was void, and that the property was liable to execution, subject to the mortgages mentioned. The defendant *Hinz* and wife appeal from that portion of the judgment which injuriously affects their interests.

For the appellants there was a brief by *Lamoreux & Shea*, and oral argument by *C. A. Lamoreux*.

For the respondent there was a brief by *Geo. H. Singleton* and *D. Lloyd Jones*, and oral argument by *Mr. Jones*.

BARDEEN, J. The testimony in this case seems to sustain the findings of the trial court, and, unless we can say that there has been some misapplication of legal principles, the judgment should not be disturbed. It is true that the court has found that in the year 1876 the defendant *W. F. Hinz* borrowed $2,000 from his wife, and that in 1878 they settled and he then gave her a note for $2,300; also, that in the year 1887 he purchased the property in question for $6,000, and applied thereon the amount due his wife on the

note, he paying the remainder of the purchase price. From this the appellants argue that the case comes clearly within the lines of *Martin v. Remington*, 100 Wis. 540, and the judgment herein cannot stand. That was an extreme case, and the rule stated therein was carried as far as the court is disposed to go. Nevertheless, we think it was correctly decided upon the facts presented, and which we believe are quite distinguishable from the case at bar. In that case the husband took the wife's money and entered into a series of real-estate speculations as her agent, taking the title in his name for convenience. Here the wife loans the money to her husband upon a simple promissory note, which note, by the way, seems never to have been delivered up or surrendered. It is claimed that when the property in question was purchased the understanding was that the husband was to take the title, and deed to the wife at any time she desired it. He held the title for over seven years. During this time he treated the property as his own, with his wife's consent. He mortgaged it to secure his own debt. He paid the taxes. He represented to others that it was his own property and was worth about $150,000. This information was given plaintiff before he purchased the note which was finally put in judgment, upon which this action is based. In other words, its ownership was used as a basis of credit, and, as the circumstances show, with the wife's consent. It was not purchased as the agent of the wife, nor was any assumed trust relation recognized until seven years thereafter, when the husband was insolvent and sought to evade the payment of his debts. In the meantime his wife secures other property, which is sold for $4,500, and she also takes from her husband a claim against the bank he was operating, amounting to $7,000. That she was engaged in an effort to assist her husband in evading his creditors is a fact that finds ample support in the evidence. The attempted revival of a secret trust after the lapse of so many years is

in itself suspicious. If this trust did in fact exist as claimed, the wife put it in the power of the husband to deal with the property as his own, and to obtain a fictitious basis of credit. To permit her to hold the property now would be a fraud upon those who dealt with him on the faith of his apparent ownership. *Hopkins v. Joyce*, 78 Wis. 443. There could hardly be a clearer case of estoppel. The rule is that, on account of the great facilities for fraud growing out of the relations of husband and wife, transactions of the character of those in suit will be closely scrutinized. *Howie v. Price*, 31 Wis. 82; *Rozek v. Redzinski*, 87 Wis. 525. It needs no very strict application of that rule to justify the findings and conclusions of the court below.

By the Court.—The judgment of the circuit court is affirmed.

BARDON and others, Appellants, vs. MCCALL, interpleaded, Respondent.

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October 31—November 16, 1900.

(1) *Sale of standing timber: Retention of title as security: Sale by vendee: Garnishment of purchaser by vendee's creditors.* (2) *Federal courts: Receivers: Garnishment in state court.*

1. Standing timber was purchased under a contract providing that title and possession of the timber when cut should remain in the vendor until the whole contract price was paid. The purchaser sold a portion of the timber cut, and his vendees were garnished in an action against him before they had paid the purchase price and while they still retained possession of the timber. Before the garnishment they had been notified by the original vendor that he claimed the timber. More of the original purchase price remained unpaid than was due from the garnishees. *Held*, that the garnishment could not be maintained, and that it was immaterial that, after the service of the garnishee summons, the original vendor had transferred his rights, or what was the state of the accounts between his transferee and the principal defendant.

[2. Whether garnishment proceedings may be maintained in a state court against receivers appointed by a United States court, not determined.]

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The plaintiffs on May 16, 1898, served a summons in garnishment against H. F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Railroad Company and of the Wisconsin Central Company, to charge them as garnishees in a suit against one Archie McKinnon. The garnishees answered that on March 17th they contracted with McKinnon for the purchase of 301 pieces of piling at the price of $525.80; that the same were delivered prior to the 12th day of April, 1898; that the price had not yet been paid; that on the 12th day of April one *Alex McCall* notified them that the piling was wrongfully cut and removed from real estate belonging to him, and was his property, and demanded that payment therefor be made to him; that on May 4th one A. D. Smith notified them that said piling was cut and removed from his real estate, and was his property; that on May 17th said Smith gave written notice to the garnishees that he had sold, assigned, and transferred all his interest in said piling to said *Alex McCall.* They denied any other liability, and interpleaded *McCall.* Issue was joined on the answer, and trial was had between plaintiff and *McCall*, first to the court with a jury. At the completion of the evidence the court concluded that the issue was for the court, and discharged the jury, and afterwards made findings.

It appeared on the trial that on January 17 and April 5, 1898, A. D. Smith, by two written contracts, sold to McKinnon the standing timber on premises described in each contract, giving to said McKinnon the right to cut the timber on the land, but providing that the title and possession of the logs and timber should remain in the party of the first part

until the whole contract price was paid. There was due Smith upon the first of these contracts about $1,100, and on the second $600. On May 17th, by a writing, said Smith, in consideration of $1,734.77, sold, granted, and conveyed unto *A. McCall* all logs, timber, and piles cut from the lands mentioned in the foregoing contracts, which were annexed, and all right which he (Smith) might have to seize the said timber for nonpayment of contract price, and to recover for any trespass by any one in removing tamarack piles, and to recover said piles from those in possession, and also assigned the contracts themselves. On the same day McKinnon transferred to *McCall* all of his rights in the logs and piling cut from the Smith land as security for various advances made by *McCall* to him in accordance with a previously existing contract and arrangement between them whereby he was to get out certain timber for *McCall; McCall* advancing certain specified sums of money, and paying such sums as necessary for stumpage and for lienable claims; and such contract providing that the title to the land or stumpage in all cases should be taken in the name of *McCall,* and be held by him as security for all his advances. An extended trial was had upon the state of the accounts between *McCall* and McKinnon on May 16, 1898.

The court found that the garnishee defendants, Morris and Whitcomb, were not indebted to the defendant McKinnon at the time of the garnishee summons, and had no property in their possession or under their control belonging to him. He also made findings upon *McCall's* right, under his contract with McKinnon, to have the title to all timber, lumber, etc., as security for advances which he was bound to make; that the contract for the Smith logs and timber was by mistake taken in the name of McKinnon, but that said *McCall* was the equitable owner, and that *McCall* was not indebted to McKinnon at the time of the service of the summons herein, or subsequent hereto, and had no property

belonging to said McKinnon, whereupon it was adjudged that the garnishee action be dismissed, from which the plaintiffs appeal.

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

J. J. Miles, for the respondent.

DODGE, J. 1. The greater part of the trial in the circuit court and of the briefs in this court were devoted to matters quite nonessential to the conclusion reached, namely, to the state of a long account between *McCall* and McKinnon at the time of the service of summons in garnishment upon Morris and Whitcomb as receivers. All this is immaterial, for it appears that independently thereof no garnishable liability or property existed in the hands of the garnishees at the time of the service of the summons upon them. The garnishing plaintiffs could, of course, stand in no better position as against the garnishees than could McKinnon himself. They cannot recover upon their garnishment what he could not by direct action, except as his right of action might be merely delayed to a future time. *Healey v. Butler*, 66 Wis. 9, 16; *Edwards v. Roepke*, 74 Wis. 571; *Dowling v. Lancashire Ins. Co.* 89 Wis. 96.

The only thing upon which any liability of the garnishees is attempted to be predicated is the possession of 301 pieces of piling, for which they had made contract of purchase with McKinnon and had agreed to pay $525.80. It is established without controversy that these pieces of piling had been cut from the land of one Smith under a written contract of authorization which expressly reserved title to himself until the full purchase price was paid. Some $1,700 of purchase price remained unpaid. As early as May 4th, twelve days before the service of the garnishee summons, Morris and Whitcomb had been notified of Smith's claim. This was the situation on May 16th when the summons in garnishment was served.

It is now established beyond controversy in this state that a contract such as Smith gave to McKinnon is valid and that the legal title to the logs or other timber cut from such land remains in him, as a title to real estate, and that the transaction is not affected by sec. 2317, Stats. 1898, making void conditional sales of personal property. *Lillie v. Dunbar*, 62 Wis. 198; *Bent v. Hoxie*, 90 Wis. 625, 629; *Hyland v. Bohn Mfg. Co.* 92 Wis. 157. It is also established that the vendee under such a contract can confer on another only the title which he himself has, except perhaps to an innocent purchaser for value under such circumstances as to warrant conclusion of waiver or estoppel as against the holder of the legal title. *Lillie v. Dunbar, supra; Wing v. Thompson*, 78 Wis. 256. That situation did not exist between these parties; for the receivers had not, at the time of the garnishment, parted with anything of value in consideration of the attempted transfer to them. At that time, therefore, Smith had a perfect right to reclaim the piling in question, his unpaid purchase price exceeding the value thereof more than threefold. *Lillie v. Dunbar*, 62 Wis. 203; *Hyland v. Bohn Mfg. Co.* 92 Wis. 157. Had McKinnon attempted to bring suit for the contract price of this piling on May 16th, these rights belonging to Smith and insisted upon by him would have constituted a perfect defense. They would have established that no indebtedness existed from the receivers to McKinnon. This is conclusive against the maintenance of the garnishment, and it makes no difference that Smith afterwards transferred his rights, nor what may have been the state of the accounts between such transferee and McKinnon. The finding of the court that no indebtedness from the garnishees existed, and no property was held by them belonging to McKinnon, on the date of the garnishment, is sustained by undisputed evidence; and from it results, of necessity, the judgment dismissing the garnishee action.

2. An interesting question is raised as to the possibility of

maintaining garnishment against these receivers, appointed as such by one of the courts of the United States. The general principle that receivers, like other officers of court, are not subject to garnishment, is invoked, to which it is answered that the statutes of the United States (Act of March 3, 1887, and Act of August 13, 1888) have expressly made receivers appointed by United States courts subject to suit, without leave of court, in respect of any act or transaction of theirs in carrying on the receivership business. Whether this statute extends to the peculiar proceeding by garnishment, a method of equitable attachment, which our statutes declare, under certain circumstances, shall be deemed an action (sec. 2766, Stats. 1898), is an interesting question, but one which we do not feel called upon to decide, inasmuch as no liability is established and the construction of the federal statutes were better left with the United States courts unless necessity compels state courts to deal therewith. The subject has received consideration in *Irwin v. McKechnie*, 58 Minn. 145; *S. C.* 26 L. R. A. 218; *Central T. Co. v. E. T., V. & G. R. Co.* 59 Fed. Rep. 523; and in *Central T. Co. v. C., R. & C. R. Co.* 68 Fed. Rep. 685.

By the Court.—Judgment affirmed.

HASSARD, Respondent, vs. TOMKINS and another, Appellants.

October 31—November 16, 1900.

Money had and received: Rent paid in services: Lease: Ratification: Order for payment of money: Application.

1. Defendants, being entitled to a half interest in land the title to which was in plaintiff, leased the whole tract for a term of years, one half of the first year's rent to be paid by clearing the land. *Held*, that plaintiff could not, under any circumstances, recover from defendants, in an action for money had and received, his share of the rent so paid.

2. Although the lease in such case was made without direct authority from plaintiff, he became aware of its terms after it was made, received payments thereon, and treated the lessee as his tenant. *Held*, that he thereby ratified the lease as made.
3. An order directing the drawee to pay money to a third person and charge it to a certain account between the drawer and drawee becomes, when accepted and paid, a contract definitely applying the money paid to said account.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action for money had and received. The facts were not materially in dispute, and are as follows: In the year 1891 the plaintiff was the equitable owner of a quarter section of land in Ashland county, and made a contract with the defendants, who are lawyers, to take the necessary legal proceedings to perfect his title, for which services the plaintiff was to deed to the defendants a one-half interest in the land as soon as the title was perfected. Thereafter the defendants perfected the title, but the deed of division of the land was not made until July, 1895. April 2, 1894, the defendants made a written lease of the land to one Johnson for five years at the rate of $200 per year, payable quarterly, one half of the first year's rent to be paid in clearing and grubbing the premises. This lease was made without direct authority from the plaintiff, but in the year 1895 he knew its terms and made no objection. Johnson performed the grubbing, and it was indorsed upon the lease by the defendants. Thereafter Johnson paid the defendants $290 in cash on the rent and *Hassard* $95. The defendants paid over to *Hassard* $100 of the rent which they had received. The evidence further shows that there was an unsettled personal account between the defendant *Tomkins* and the tenant, Johnson, for potatoes, lumber, and other supplies furnished by *Tomkins*, and in October, 1897, *Tomkins* made the following order: "*To Andrew Johnson:* Please pay to Mitchell Brothers the sum of one hundred and four dollars ($104),

and charge the same to my account. October 4, 1897. W. M. TOMKINS." Johnson paid this order to Mitchell Bros., and afterwards charged it up on the rent account, but he was never authorized to do so.

The jury rendered a verdict of $99.50 for the plaintiff. The court set aside the verdict unless the plaintiff would remit $10 therefrom, which he did, and judgment was thereupon rendered for the plaintiff for $89.50 and costs, and the defendants appeal.

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

For the respondent the cause was submitted on the brief of *Geo. P. Rossman.*

WINSLOW, J. As will be seen from the statement of facts, the defendants have paid the plaintiff one half of all the cash received by them from Johnson, and the only claims about which there is any possible dispute are with respect to the $100 paid by Johnson in clearing and grubbing the land, and the $104 paid by Johnson upon the order of *Tomkins.*

As to the first item there are two sufficient answers to the plaintiff's claim: (1) The action is for money had and received, and this amount was never received by the defendants under any possible theory. (2) Conceding that the defendants were not authorized to make the lease containing this provision, still the plaintiff, by his own admission, was aware of its terms in 1895, and thereafter received payments thereon, and treated Johnson as his tenant, without objection; thus ratifying the lease as made.

As to the item of $104, it appears without dispute that *Tomkins* individually had an unsettled account with Johnson for supplies furnished. The order directs Johnson to pay Mitchell Bros. $104 and charge it to *Tomkins's* account. Johnson paid the money to Mitchell Bros. pursuant

to the order. Having made the payment under the order, he was bound to apply the payment as the order directed. He could not apply it to the rent account without *Tomkins's* consent, because the order, when accepted and paid by Johnson, became a contract, which definitely applied the money paid under it to *Tomkins's* account.

A verdict for the defendants should have been directed.

By the Court.— Judgment reversed, and action remanded for a new trial.

RICE and others, Appellants, vs. ASHLAND COUNTY, Respondent.

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s114 182

October 31 — November 16, 1900.

Construction of statutes: Action: Dismissal for failure to prosecute: "Commencement:" Claim against county: Appeal from disallowance.

1. If, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, an obscurity of meaning exists calling for judicial construction; and if its real purpose can be discovered by looking to the act as a whole, to the subject matter with which it deals, and to its reason and spirit, and such purpose can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law the same as if it were plainly expressed by the literal sense of such language.
2. Sec. 2811*a*, Stats. 1898 (providing that circuit and superior courts may dismiss "any and all actions or proceedings pending therein in which issue shall have been joined and which shall not be brought to trial within five years from and after" their commencement), applies only to actions and proceedings pending for five years after jurisdiction thereof has been obtained by the courts named. It has no application, therefore, to an appeal from the disallowance of a claim by a county board, which, through a mistake of the county clerk, did not reach the circuit court until more than five years thereafter and but a short time before the motion to dismiss was made.

3. The fact that, by force of sec. 4242, Stats. 1898, the presentation of a claim to a county board is to be considered the commencement of an action within the meaning of the statutes of limitations, does not render such an event generally the commencement of an action in a judicial sense.

APPEAL from an order of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Appeal from an order dismissing an appeal from a determination of the county board of supervisors of such county disallowing a claim. Such disallowance took place October 29, 1892. The appeal was seasonably taken to the circuit court. The county clerk mislaid the papers in his office and for that reason failed to make a return on the appeal according to law, to the clerk of the circuit court, till December 10, 1899. At the January, 1900, term of such court, defendant, by its attorney, moved for a dismissal of the appeal because plaintiffs had failed to bring their action to trial within five years after the commencement thereof. The motion was based on sec. 2811*a*, Stats. 1898, upon the theory that the presentation of the claim to the county board was the commencement of the action within the meaning of such section. The motion was granted, and plaintiffs appealed from the order which was accordingly entered.

For the appellants there was a brief by *Tomkins & Merrill* and *Lamoreux & Shea*, and oral argument by *C. A. Lamoreux* and *W. M. Tomkins*.

For the respondent there was a brief by *Sanborn, Gleason & Sleight*, and oral argument by *A. W. Sanborn* and *Richard Sleight*.

MARSHALL, J. This appeal turns on the construction of sec. 2811*a*, Stats. 1898, which reads as follows: "The circuit courts and the superior courts may dismiss, upon their own or upon the motion of either party and with or without notice, any and all actions or proceedings pending therein in

which issue shall have been joined and which shall not be brought to trial within five years from and after the commencement of such action or proceeding." Appellants' counsel contend that the words "pending therein," and the words "commencement of such action or proceeding," should be construed together, the legislative intent being to provide for a dismissal of actions and proceedings after they have been pending in the circuit court or superior court for five years without having been brought to trial. If that be correct, obviously it was improper to dismiss the action at the next term of the court after it was entered as pending therein. Counsel for respondent contend, as indicated in the statement of facts, that the words "commencement of the action or proceeding" refer to the original institution thereof, which in this case was more than seven years prior to the dismissal. If that be correct the decision appealed from is right.

Reference is made, in support of respondent's position, to sec. 4242, Stats. 1898, which provides that the presentation of any claim to a county board for allowance shall be considered the commencement of an action within the meaning of the statutes of limitations. This court, independent of statute, held that such an event was the commencement of an action. *Marsh v. St. Croix Co.* 42 Wis. 355. But neither the statute nor the decision referred to is necessarily controlling. The mere fact that an action, by force of the statute, is deemed commenced for the purposes of the statutes of limitations by the presentation of a claim to a county board for allowance, does not render such an event generally the commencement of an action in a judicial sense. But if, in accordance with *Marsh v. St. Croix Co.*, we say this action was commenced when the claim was presented to the county board, that is not decisive of the question under consideration if the language of sec. 2811*a* is open to construction, and we think it is.

True, the language of the section seems too plain to call for judicial construction, if we look to that alone. If we were not to go further, the familiar rule would apply, that words which are plain must be taken in their literal sense. There must be some uncertainty of sense, else the natural and ordinary meaning of the words must prevail. When there is no such uncertainty, to resort to judicial construction to extend or restrict the meaning of words and give to a legislative enactment a character other than that which its language plainly indicates, it is said, "would be extremely dangerous, for there would be no law, however definite and precise in its nature, which might not thereby be rendered useless." *Gilbert v. Dutruit*, 91 Wis. 661. But courts are obliged in many cases to go further, otherwise many wise legislative enactments would lead to mischievous results. Uncertainty of sense does not alone spring from uncertainty of expression. It is always presumed, in regard to a statute, that no absurd or unreasonable result was intended by the legislature. Hence if, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, an obscurity of meaning exists, calling for judicial construction. *State ex rel. Heiden v. Ryan*, 99 Wis. 123. We must, in that event, look to the act as a whole, to the subject with which it deals, to the reason and spirit of the enactment, and thereby, if possible, discover its real purpose; and if such purpose can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law the same as if it were plainly expressed by the literal sense of the words used. In that way, while courts do not, and cannot properly, bend words out of their reasonable meaning to effect a legislative purpose, they do give to words a liberal or strict interpretation within the bounds of reason, sacrificing literal sense and rejecting every interpretation not in harmony with the evident intent of the lawmakers, rather than that such intent shall fail. *State ex rel. Heiden*

v. Ryan, supra; Ogden v. Glidden, 9 Wis. 46; *Blunt v. Walker*, 11 Wis. 334; *Clark v. Janesville*, 10 Wis. 136; *People ex rel. Att'y Gen. v. Utica Ins. Co.* 15 Johns. 379; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 300.

Applying the foregoing, to the law under consideration, obscurity is easily discovered. The words "shall not be brought to trial" clearly bear a close relation to the words "pending therein." The two expressions, taken together and read in their obvious relation to each other, mean that, upon the contingency mentioned in the section happening, an action pending in a circuit or superior court that shall not have been brought to trial therein may be dismissed by the court on its own motion or the motion of either party, with or without notice. That being the case, if the literal meaning of the words "within five years from and after the commencement of such action or proceeding" be given to them, it is plain to be seen that, if the date of the commencement of an action or proceeding antedate five years the time of the commencement of the pendency thereof in the circuit or superior court, such action or proceeding is subject to dismissal without notice upon its reaching either of such courts. An action may reach a circuit court by appeal from a county court or a justice's court, or a body clothed with *quasi*-judicial functions, like a county board, and the circumstances be such that the court may refuse to take any jurisdiction of the matter whatever other than to dismiss it and render a judgment for costs. It may be more than five years old, as in this case, before it reaches such court. A law permitting such consequences would be highly unreasonable; it would be more than unreasonable,— it would be absurd. Therefore we must say that the legislature had no such purpose in making the law in question, if one that is reasonable can be discovered within the fair meaning of its language.

It seems that a reasonable purpose, sought by the enact-

ment of the law under consideration, is indicated therein. It will be observed that only actions are subject to dismissal in which issue shall have been joined. Three things are essential to the dismissal: the action must be pending in the circuit or superior court, issue must be joined, and the action must have been pending for five years from its commencement. The evident purpose of the act is to deny the use of the courts to parties who allow their action to be pending therein for five years without bringing it to trial. The words "commencement of the action" refer to the court where the action is pending and where it can be brought to trial. That meaning is within the reasonable scope of the language of the act, and when we read the act with the end in view which we say the legislature sought to attain, its language expresses the purpose indicated. The words "pending therein," "shall not be brought to trial," and "within five years from and after the commencement of such action," all point to conditions in the same court. They contemplate an action pending for five years after the jurisdiction thereof shall have been obtained by a circuit or superior court without being brought to trial. That meaning gives a sensible interpretation to all the words of the act and a sensible construction to the act as a whole, and in our judgment is the one which the legislature intended to and did express, though without that freedom from ambiguity which ought to exist in a statute. It follows that the order of the circuit court is erroneous and must be reversed.

By the Court.— The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

MIDLOTHIAN IRON MINING COMPANY, Respondent, vs. DAHLBY and others, Appellants.

November 1 — November 16, 1900.

Orders: Review on appeal from judgment: Exceptions: Insufficiency of complaint: Waiver: Tax titles: Insufficient notice of sale.

1. An order refusing to dismiss an action for want of prosecution under sec. 2811*a*, Stats. 1898, is an intermediate order and will not be reviewed on appeal from a judgment subsequently rendered unless it was excepted to and the order and exception incorporated into the bill of exceptions.
2. The question whether a complaint states a cause of action will not be considered on appeal unless it was raised in the trial court by demurrer or objection to the admission of any evidence thereunder.
3. A county treasurer's notice of the sale of lands for taxes, stating that they would be sold at a time designated, "in the town of B.," without stating where, does not comply with sec. 1130, Stats. 1898 (providing that such notice shall state that the lands will be sold at public auction "at some public place, *naming the same*, at the seat of justice of the county"), and a deed based upon the sale conveys no title.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This action was commenced April 29, 1887, to set aside a tax deed issued by Bayfield county to itself on sale of 1882. The defendants were made parties as the holders of a quit-claim deed from the county. The complaint alleged that the deed was void for a number of reasons, and, among others, that there was no proper notice of sale and no affidavit of nonoccupancy. Issue was joined April 21, 1888, and the answer was a general denial. The action was noticed for trial at the June term of court for 1899. The defendants then made a motion to dismiss the action for the reason that it had not been brought to trial within five years after it was commenced, based upon an affidavit of defendants' attorney showing the facts. The plaintiff contested

the motion, and produced affidavits showing that propositions for settlement had been made from time to time, and that the case had hung along, and these offers were still pending. The court made an order denying the motion and holding the case for trial upon the payment by plaintiff to defendants of $10 motion costs. Such costs were paid, and accepted by defendants' attorneys. No exceptions were filed to this order. The case was afterwards brought to trial, and the court made findings that the plaintiff was the owner of the land, and that the tax deed in question was void because of defects in the notice of tax sale and in the affidavit of posting, and because no affidavit of nonoccupancy had been made. Judgment was entered for plaintiff, and the defendants have appealed.

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins*.

For the respondent there was a brief signed by *Clapp & Macartney*, and oral argument by *N. H. Clapp*.

BARDEEN, J. The motion to dismiss this action was based upon sec. 2811*a*, Stats. 1898. This section provides that the circuit and superior courts may dismiss any and all actions or proceedings pending therein in which issue has been joined and which shall not be brought to trial within five years after the commencement of such action or proceeding. The order is an intermediate one, not involving the merits and necessarily affecting the judgment. The appeal is from the judgment. This court will not review such intermediate orders unless excepted to and the order, with the exceptions, brought into the record by a proper bill of exceptions. *Keller v. Gilman*, 96 Wis. 445; *Donkle v. Milem*, 88 Wis. 33. The bill of exceptions fails to show any exception taken to the order. Hence we cannot review it.

On the merits, the only objection raised by defendants is that the complaint does not state a cause of action. But this

question is not before us. No objection to the complaint on that ground was ever taken. The only objection appearing in the record is to certain scraps of evidence, on the ground that it was not admissible under the pleadings. If the defendants believed in good faith that the complaint was insufficient, it was their duty to challenge it by a demurrer or objection to any evidence thereunder, so that the trial court might have an opportunity to rule thereon, and the other side a chance for amendment. This was not done, and the defendants are therefore without any foundation to base their contention upon.

The evidence offered fully sustained the conclusion of the trial court that defendants' tax deed was without legal basis. The treasurer's notice of sale stated that the lands would be sold at a time designated, "in the town of Bayfield," without stating where. Sec. 1130, Stats. 1898, says that such notice shall state that such lands will be sold at public auction "at some public place, *naming the same*, at the seat of justice of the county." The notice is flagrantly bad, and the deed based upon it conveyed no title.

Other defects in the record leading up to the sale were shown, but, inasmuch as counsel for defendants do not attack the court's findings, it is unnecessary to pursue this discussion.

By the Court.— The judgment is affirmed.

MIDLOTHIAN IRON MINING COMPANY, Respondent, vs. BELKNAP and others, Appellants.

CUMBERLAND IRON MINING COMPANY, Respondent, vs. BELKNAP and others, Appellants.

November 1—November 16, 1900.

(1) *Tax titles: Limitations: Interruption of constructive possession.* (2) *Value and quantity of timber wrongfully taken.*

1. At the time of the recording of tax deeds the lands, consisting of adjoining government subdivisions, were vacant and unoccupied. Thereafter the several original owners of such lands united in building a substantial log cabin on one of the subdivisions, and used and occupied the same continuously for about eight months, keeping there a crew of men, averaging seven or eight in number, who during all of said time were engaged in prospecting for iron ore and digging test pits over the whole tract. All this took place within three years after the recording of the tax deeds. *Held*, that such possession on the part of the original owners interrupted the constructive possession of the grantees in the tax deeds and the running of the statute of limitations (sec. 1187, Stats. 1898) in their favor, and created a bar against them.
2. Upon the evidence (stated in the opinion) in an action to recover the value of timber unlawfully cut, a finding as to the value per thousand feet is left undisturbed, but a finding as to the quantity taken, based on a full scale of all the timber cut as if it were sound, straight, and entirely merchantable, is *held* unwarranted, and the maximum amount for which defendants should have been held liable is determined.

APPEALS from judgments of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Modified in the Midlothian Case; affirmed in the Cumberland Case.*

Two actions to recover the value of certain timber cut by defendants upon lands owned by the plaintiffs. The defendants justified under tax deeds. In the *Midlothian Case* the land involved was S. ½ N. E. ¼ and S. E. ¼, 16—44—5 W. In the *Cumberland Case* the land was described as N. ½ N. E. ¼, of the same section. In the first case the court

found the plaintiff was the owner of the land described; that during the logging season of 1896–97, the defendants cut and removed therefrom 1,181,216 feet of logs, worth $2.25 per thousand feet, or $2,657.73; that the defendants entered in good faith, claiming under certain tax deeds from Bayfield county, issued in the sale of 1882, and recorded in 1885 and 1886; that the defendants showed no title to the N. E. ¼ S. E. ¼; that within three years from the date of the record of said deeds the plaintiff took open and notorious possession of said lands, and remained in possession from April 6, 1887, until about December 18, 1887. Judgment for the amount stated and costs was entered for plaintiff. In the other case the court's findings were the same except that the amount of timber cut was found to be 50,000 feet. Judgment was entered for $112.50 damages and costs for plaintiff. Due exceptions to the findings were filed, and the questions raised will be more fully stated in the opinion. The defendants in each case have appealed.

For the appellants there was a brief by *Tomkins & Merrill*, and oral argument by *W. M. Tomkins* and *A. W. Sanborn*.

For the respondents there was a brief by *S. J. Bradford*, attorney, and *Clapp & Macartney*, of counsel, and oral argument by *N. H. Clapp*.

BARDEEN, J. Two questions are presented for consideration: (1) Was the plaintiffs' occupation of the land sufficient to disengage the running of the bar of the statute in favor of the tax deed claimants? (2) Are the findings in regard to the value and amount of timber taken supported by the evidence?

1. At the time the tax deeds under which the defendants claim were recorded the lands were vacant and unoccupied. The plaintiffs held the original title. The lands were supposed to be what are called "iron lands." Early in 1887

the two corporations, acting jointly, employed a force of men to enter upon and explore these lands and the southwest quarter of the section for iron. The entry was made in April. The men entered upon the southeast quarter of the southeast quarter, and built a substantial log cabin eighteen by twenty-four feet, and continued to use and occupy it until December following. The average crew of men was seven or eight. Using the cabin as a base of operations, the testimony shows that the men explored for iron and dug test pits over the entire east half of the section. These operations continued during the entire summer and until late in the fall. During all this time the men were engaged in prospecting and digging pits here and there in search of mineral. The evidence is not very definite as to the amount of work done on each forty, but it is undisputed that these operations extended over the entire tract. The character of their work, the extent of their operations, and the length of time they were continued is significant. The possession was actual, open, visible, and continuous for a period of about eight months. It is deemed sufficient to bring it within a line of cases decided by this court beginning at an early day to the effect that such possession disengages the bar of the statute in favor of the tax deed and creates a bar against it. *Sydnor v. Palmer*, 29 Wis. 226; *Lewis v. Disher*, 32 Wis. 504; *Haseltine v. Mosher*, 51 Wis. 443; *Smith v. Sherry*, 54 Wis. 114; *Finn v. Wis. River L. Co.* 72 Wis. 546. In other words, the constructive possession of the tax-deed claimant only ripens into an absolute title when the lands remain vacant and unoccupied *continuously* during the whole period named in the statute. *Cornell University v. Mead*, 80 Wis. 387. Applying the rule to this case, we find that defendants' constructive possession was interrupted for such a considerable period within the three years next after the recording of the tax deeds as to disengage the running of the statute in their favor, and to create a bar against them.

2. The court found the value of the timber taken to be $2.25 per thousand feet. This finding is based upon the testimony of two witnesses for plaintiffs fixing the stumpage value at $4, and is opposed by two witnesses for defendants, who examined the timber, and put its value at from seventy-five cents to $1 per thousand feet. Considering the defective character of the timber, we would have been better satisfied if the price had been somewhat reduced. Under the circumstances, however, we cannot say that it is so decidedly against the evidence as to require us to disturb the court's findings.

Upon the question of the quantity of the timber found, a much more serious difficulty arises. The plaintiffs' case is based entirely upon the testimony of the witnesses Johnson and Otness, who went to the land together some time after the timber was cut, and made a trespass scale. They made a measurement of thirty or forty trees, and averaged the rest. They made no allowance for the jump of the tree, or for rot or defects, except in a few cases where the stump indicated the tree was rotten. Generally speaking, their scale was a full scale of the entire timber cut as if it was sound, straight, and entirely merchantable. The court adopted such scale as the basis of plaintiffs' recovery, and in the *Midlothian Case* gave the plaintiff judgment for 1,181,216 feet at $2.25 per thousand, and in the other case for 50,000 feet at the same price. The plaintiffs' scale shows 3,191 logs in all. On the basis of the scale allowed by the court, this would make the logs run about 2.59 logs to the thousand feet, or 386 feet to the log. Opposed to this conclusion we have an estimate of the timber made by the witness Welcome, who fixed the amount of timber on the land at 950,000. We have the testimony of all the witnesses that the timber was very rotten and defective. The plaintiffs' scaler Johnson testifies that the timber was punky and contained "ring rot, center rot, and stump rot;" that

from one quarter to one third of the logs were left on the ground as defective, many of which he considered contained sufficient merchantable timber to warrant the hauling. The other witnesses say they were so defective as to be worthless. We have also the testimony of nearly all the witnesses who had seen the timber that it would run from four to five logs to the thousand feet. In addition to this, we have the testimony of the witness Arnott, who made an actual scale of the logs as they were delivered, on the basis of which scale the logs were sold by defendants. His scale was tested by the district scaler, and the two scales, it is said, "were about alike." Arnott's scale showed 3,393 logs, containing 820,890 feet, or about 242 feet to the log. It is an undisputed fact in the case that of the logs scaled by him there was 156,000 feet cut on state lands. This would leave 664,890 feet cut on the plaintiffs' lands. The manner in which plaintiffs' scale was made renders it of no greater value than a mere guess at the amount. It evidently included a scale of the entire amount of timber on the land, regardless of its defective character. It is further impeached by the extravagant size of the logs. The defendants' scale of the logs was made when they could be examined and their defective character ascertained. Moreover, it corresponds more nearly to the testimony in regard to the size of the logs. Under these circumstances the conclusion is irresistible that the court's findings as to the quantity of logs is unwarranted and ought not to be permitted to stand.

The testimony as to the amount of timber cut on the lands of the *Cumberland Company* is very meager and unsatisfactory. One witness says the amount was about 50,000 feet. No basis is furnished by the testimony that will permit us to disturb the court's finding in this case.

Our conclusion is that the evidence will not permit a finding of a greater amount than 664,890 feet on the entire tract of land, 50,000 feet of which were cut on the lands of the

Cumberland Iron Mining Company. This leaves 614,890 feet that were cut on the *Midlothian* lands, which, at the price of $2.25 per thousand feet, would reduce the recovery in that case to $1,383.50 and interest from May 1, 1897.

By the Court.— In the case of the *Midlothian Iron Mining Company* the judgment is modified, with costs to appellants, to stand for the sum of $1,383.50 and interest from May 1, 1897. In the *Cumberland Iron Mining Company* case the judgment is affirmed.

KNUDTSON, Appellant, vs. LEARY, County Clerk, Respondent.

November 1 — November 16, 1900.

Taxation: Redemption moneys: Action against county clerk after six years from sale.

Under sec. 1168, Stats. 1898, if the county clerk holds tax redemption money after the expiration of six years from the date of the sale of the property, he holds it in trust for the county treasurer or the county and not for the holder of the certificate redeemed, and the latter cannot recover such money from the clerk.

APPEAL from an order of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Van Hecke & Smart*, and for the respondent on that of *F. J. Smith.*

CASSODAY, C. J. This is an appeal from an order sustaining a demurrer to the complaint, which alleges, in effect, that at the election in November, 1896, the defendant was elected county clerk of Lincoln county; that he qualified as such; that he was subsequently re-elected, and requalified, and had held the office ever since January, 1897; that the treasurer of that county, at the regular tax sales duly held at the times

and places required by law for the nonpayment of taxes in the respective years 1878 to 1884, inclusive, did sell to the county, in the manner required by law, the respective pieces of land described, for the several amounts stated, and thereupon delivered to the county his certificates of such sales, respectively, each of which was numbered as therein stated; that thereafter the county duly sold, transferred, and assigned such several certificates to various and divers parties; that prior to the demand hereinafter mentioned the several persons owning and holding such certificates, through mesne assignments and transfers, duly sold and transferred them to the plaintiff, who is now the legal owner and holder of them, and each and every of them; that after such transfers of the several certificates by the county the respective owners of such lands, at the several times therein stated, from January 14, 1880, to May 11, 1889, inclusive, redeemed the several parcels of land from such sales for such taxes, and paid to the then county clerk, for the use of the legal owners and holders of such certificates, respectively, the several amounts necessary to redeem the same as therein stated; that each of such county clerks in turn at the expiration of his term of such office delivered and turned over to his successor in such office such redemption moneys so received by him, and took the receipt of his successor in office therefor, and thereafter such successor held such moneys so received by him in trust for the use and benefit of, and subject to the order and disposal of, such legal owners and holders of such certificates, respectively; that the defendant, upon his induction into such office of county clerk, received from his predecessor, and receipted to him therefor, such moneys for the use and benefit of the several persons legally entitled thereto, and that the defendant, as such county clerk, has ever since held such moneys in trust and for the use and benefit of the several persons entitled thereto, and continues to so hold the same; that prior to making the demand here-

inafter mentioned the plaintiff was, and now is, entitled to have such redemption moneys paid over to him, and that it was and is the duty of the defendant, as such county clerk, to so pay the same; that July 3, 1899, and prior to the commencement of this action, the plaintiff duly demanded of the defendant the payment to him of such moneys, and at the same time exhibited to him the several certificates mentioned, the same being then in the plaintiff's possession, but that the defendant wrongfully and unjustly refused to so pay such moneys to the plaintiff; that by reason of such refusal the plaintiff has been damaged in the sum of $645.66, and demands judgment for that amount and costs.

The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The statute authorized the owner or occupant of any of such lands so sold for taxes, at any time within three years from the date of the sale thereof, to redeem the same, or any part thereof or interest therein, by paying to the clerk, *for the use of the purchaser*, his heirs or assigns, the amount for which such land was sold and all subsequent charges thereon authorized by law. Stats. 1898, sec. 1165. The statute in force when this action was commenced and the demand made declared that: "The county clerk shall, upon demand of any person *entitled* to any redemption money in his hands, forthwith pay the same to such person, and at the expiration of his term shall pay to his successor in office all redemption money in his hands. All such money *shall*, after the expiration of *six years from the date of the sale* of the property, *be paid into the county treasury by said clerk*, and with such payment he *shall file* with the county treasurer a *certified statement*, giving the number of the certificate redeemed, *its date*, the name of the purchaser thereof and the *amount paid* on such redemption. The legal holder of any certificate so redeemed may thereafter present the same to the *county treasurer* and receive the amount paid upon such

redemption *from the general fund;* and said redemption money, when paid into the county treasury, *shall become a part of the general fund and be disbursed as other moneys belonging thereto. On such payment* of said redemption money to the *county treasurer* said clerk shall enter on the sales book, opposite the appropriate number of the certificate, *the date of making such payment.*" Sec. 1168. It is substantially the same as the prior statutes (S. & B. Ann. Stats. secs. 1168, 1168*a;* Laws of 1880, ch. 220; and Laws of 1881, ch. 80).

As indicated, the last tax sale mentioned was in 1884. All such sales were required by law to be made in May. Stats. 1898, sec. 1130. The statute quoted required that, "after the expiration of six years from the date of the sale," all such redemption moneys in the hands of any such county clerk should "be paid into the county treasury by said clerk." If the several county clerks had performed their several duties as thus prescribed by statute, all such redemption moneys would have been paid by them, respectively, into the county treasury prior to June, 1890, which was more than six years from the last sale for which money was so paid to redeem, and more than six years before the defendant became county clerk. During such six years from the date of any such sale the county clerk held such redemption money in trust "for the use of the purchaser, his heirs or assigns," as provided in sec. 1165. But after the expiration of such six years from the date of the sale such clerk was expressly commanded by the statute quoted to pay such redemption moneys into the county treasury, and it was provided that when so paid into the county treasury the same should become a part of the general fund and be disbursed as other moneys belonging to the general fund. Under such statutes it is manifest that at the end of such six years the county clerk ceased to hold such redemption money in trust "for the use of the purchaser, his heirs or

assigns," and at once commenced holding the same in trust for the county treasurer or the county. This is made plain by the provision of the same statute, which, after the expiration of such six years, authorized the legal holder of any certificate so redeemed to "present the same to the county treasurer and receive the amount paid upon such redemption from the general fund." It follows from what has been said that as all such redemption moneys were received by the defendant, as such county clerk, more than six years after the date of any of the sales mentioned, he held the same in trust for the county treasurer or the county, and not for the plaintiff. The plaintiff may possibly have his remedy against the county or county treasurer, but certainly not against the defendant in this action. If the allegations of the complaint are true, and the defendant still holds such redemption moneys, then he does so in violation of his statutory duty, which he may undoubtedly be compelled to perform. He and the county treasurer are both acting under the mandate of the statute, which they should respectively obey.

By the Court.— The order of the circuit court is affirmed.

GOODWILLIE and another, Appellants, vs. THE LONDON GUARANTEE & ACCIDENT COMPANY, Respondent.

November 1 — November 16, 1900.

Insurance against employer's liability: Injury to minor illegally employed: Construction of policy.

A policy, insuring against liability on account of any injuries sustained by employees of the assured resulting from an accident happening to such employee while engaged in the service of the assured in connection with a certain factory, provided that "if any child is illegally employed on the work of the assured, the company will not be liable for any injuries which may be thereby sustained or occasioned." *Held*, that no recovery could be had thereunder for an injury to a child under twelve years old employed in violation of sec. 1728*a*, Stats. 1898, even though the injury was not the proximate result of the illegal employment.

APPEAL from a judgment of the circuit court for Marathon county: CHAS. V. BARDEEN, Circuit Judge. *Affirmed.*

This is an action upon a policy of indemnity insurance. The complaint, after alleging the copartnership of the plaintiffs, and the fact that as such copartners they were engaged in the operation of a box manufactory at Wausau, and after alleging the corporate character of the defendant, and the fact that it was licensed to do business in the state of Wisconsin as an insurance corporation, stated the following facts, in substance:

On the 28th day of November, 1893, the defendant, for a valuable consideration, executed and delivered to the plaintiffs its policy of insurance, whereby it insured the plaintiffs for a period of one year against any liability for damages (not exceeding $1,500), on account of any injuries sustained by any employee of the plaintiffs, resulting from any accident which might befall such employee while actively engaged in the service of the plaintiffs in connection with said box factory. Said policy also contained a further condition, upon the back thereof, "If any child is illegally employed on the work of the assured, the company will not be liable for any injuries which may be thereby sustained or occasioned." On the 25th of January, 1894, one Peter Kutchera, an employee of the plaintiffs in said box factory, under the age of twelve years, but supposed by plaintiffs to be over the age of fourteen years, was severely injured by an accident while actively engaged in the plaintiffs' service in said factory, and immediately made claim against the plaintiffs for damages by reason of such injury. Immediate notice was given to said defendant of such injury, and satisfactory proofs thereof were duly furnished in accordance with the terms of the policy. The defendant, however, denied and disclaimed any liability by reason of said accident, and still insists on such denial. Said Kutchera thereafter commenced an action in the proper court against the plaint-

iffs on account of such injury, and that the plaintiffs tendered the defense thereof to the defendant, but the defendant declined to defend said action and compelled the plaintiffs to defend the same at their own expense, which expense amounted to the sum of $671.24 over and above taxed costs, which sum was paid by the plaintiffs before the commencement of this action. Said action was tried upon the merits, and resulted in a verdict and judgment in favor of said Kutchera for $3,500 and costs. The defendant, upon notification of such verdict, again refused to pay the amount of the policy or defend said action. Said action was appealed to the supreme court of the state of Wisconsin, and reversed on the ground that the verdict did not sufficiently cover the question of negligence involved. *Kutchera v. Goodwillie*, 93 Wis. 448. The plaintiffs on such appeal insisted that no negligence on their part was shown, but the supreme court, upon reversal of said action, held that there was sufficient evidence on the question of the plaintiffs' negligence to be submitted to the jury and to sustain a judgment in favor of said Kutchera against the plaintiffs, providing the jury should find such negligence. Thereafter the plaintiffs on advice of their counsel, after a full and fair statement of the case, settled said claim of said Kutchera for the sum of $2,000, having previously notified the defendant of the opportunity of making said settlement, and of their belief in the wisdom thereof, and requested said defendant to join with them therein. The plaintiffs have fully performed all the conditions of said contract on their part, but the defendant has refused to perform its part thereof, by refusing to pay the amount due on such policy, or any part thereof. The defendant has always based its denial of liability upon the specific ground that the policy did not cover the accident in question, for the reason that Kutchera was employed by the plaintiffs contrary to the agreement or condition hereinbefore set forth respecting the illegal em-

ployment of a child. As matter of fact, Kutchera had a good and valid cause of action against the plaintiffs for the injuries sustained by him, based upon the negligence of said plaintiffs in other respects than the fact that he was employed while under the statutory age. The supreme court held in said action that Kutchera's injury was not proximately caused by such illegal employment, which adjudication has not been changed or reversed.

Upon the opening of the trial in the circuit court the defendant objected to the introduction of any evidence under the complaint, for the reason that the complaint did not state facts sufficient to constitute a cause of action. This objection was sustained, and, the plaintiffs declining to amend their complaint, judgment was entered dismissing the complaint with costs, from which judgment the plaintiffs appeal.

For the appellants there was a brief by *Mylrea & Bird*, and oral argument by *C. B. Bird.*

For the respondent there was a brief by *Bump, Kreutzer & Rosenberry* and *C. H. Van Alstine*, and oral argument by *Mr. Van Alstine.*

WINSLOW, J. Our statute (sec. 1728*a*, Stats. 1898) prohibits, under penalty of a fine, the employment of a child under the age of fourteen years in any factory or workshop, except that, if a prescribed permit be obtained from the county judge, the employment of a child over twelve years of age is allowed. It appears by the complaint that the child who was injured in the present case was under twelve years of age, and received his injuries as the result of negligence on the part of the plaintiffs, and the question presented is whether the defendant's policy of insurance covers the liability of the plaintiffs for such injuries.

There are but two clauses of the policy which are material to be considered upon this inquiry. They must, upon fa-

miliar principles, be construed together, and for convenience may properly be placed in juxtaposition. So placing them, the provisions in question are to the effect that the defendant insures the plaintiffs in a sum not exceeding $1,500 against liability on account of any injuries sustained by any of plaintiffs' employees resulting from an accident happening to such employee while engaged in the plaintiffs' service in connection with the box factory, *provided* that, "if any child is illegally employed on the work of the assured, the company will not be liable for any injuries which may be thereby sustained or occasioned." The question is, What do these clauses mean? The plaintiffs' claim is that by these provisions the defendant insured the plaintiffs against liability for injuries to any employee, whether legally or illegally employed, except such injuries as were proximately caused by the illegality of the employment. Is this the proper construction of the contract?

In considering this question, it must be taken as certain that the proviso as to the illegal employment of children was intended as a substantial limitation of the previous promise of indemnity, and not as an enlargement thereof. This is self-evident. It is also unquestionable, as a legal proposition, that, in a case of a doubtful or ambiguous clause in a contract, that construction should be given to it which will be in harmony with law, rather than a construction which contemplates a violation thereof in order to give it effect. The clause in question is plainly an ambiguous one, and not happily expressed. In the popular and nontechnical sense, any injury happening to a boy under twelve years of age who is employed in a shop, or any injury happening to another employee on account of the boy's negligence or youth, is an injury occasioned by the illegal employment of the boy. In other words the injury would not have resulted had the boy not been employed. But in the technical and strictly legal sense an injury happening to such a boy or to

another employee through the agency of the boy is not "occasioned" by the illegal employment of the boy unless the injury is the "proximate" result of the illegal employment. It is quite difficult to understand how the mere fact of the illegality of the boy's employment could be the proximate cause of any injury happening to the boy himself. It seems very evident that, if a boy less than twelve years of age is hurt by a defective machine, an unprotected shaft, or through lack of necessary warning, the proximate cause of the injury will ordinarily be the negligent use of the defective machine, or the unprotected shaft, or the negligent failure to warn, and not the mere fact that the law prohibited his employment. *Kutchera v. Goodwillie*, 93 Wis. 448. We do not say that cases may not arise where an injury to such a boy may not be properly held to be proximately caused by the fact of the illegal employment, but certainly in the majority of cases of injury the proximate cause would undoubtedly consist in some act of negligence occurring after the employment and independent of the fact of its illegality. If this be so, then the construction which is insisted upon by the appellants renders the limitation of liability substantially no limitation, but, on the other hand, makes it an affirmative declaration of liability for injuries happening to a boy whose very presence as an employee in the shop is prohibited by law. In other words, the supposed limitation becomes in fact no limitation as respects injuries to the boy himself, but, rather, a promise of protection in case of the violation of law. The clause should be given a meaning in accordance with the evident intention, if the language used will reasonably admit of such a meaning; and it should be given a meaning which will harmonize with the policy of the statutes, rather than one which contemplates a violation of the statutes.

With these principles in view, we can entertain no doubt that the meaning of the clause in question which was in-

tended by the parties, and which should be given to it by the courts, is the popular meaning as distinguished from the purely technical legal meaning. So construed, all difficulties disappear. The clause becomes a substantial limitation, as undoubtedly intended by the parties; and it encourages no violation of law, but, rather, discourages it.

In this view of the case, it becomes unnecessary to consider the serious and perhaps doubtful question which was debated on the argument, namely, whether the clause in question would be void on the ground of public policy if given the construction claimed for it by appellants.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

MCDONALD, Respondent, vs. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY, Appellant.

108 213
113 *118
108 213
52 LRA 447
57 LRA 456

November 1—November 16, 1900.

Promissory note as payment: Evidence of express contract: Court and jury: Life insurance.

1. An express contract that a note given for a debt of the maker should operate as a payment may be established in whole or in part by circumstantial evidence, but mere circumstances that point one way as reasonably and significantly as the other are insufficient for that purpose, and in the absence of other evidence the question should not be submitted to the jury but should be determined by the court, as matter of law, against the party asserting such contract, upon whom was the burden of proof.
2. Upon the evidence in an action upon a life insurance policy—showing, among other things, that the application for insurance was accompanied by a note of the applicant payable ten days after date for the amount of the first premium, a memorandum being indorsed on the note to the effect that it was to be returned if the application was not accepted; that the note was taken, as the agent

expressed it, to "tie up" the applicant; that both application and policy provided that the insurance should not become binding until actual payment of the first premium; that the policy, with the customary receipt for the first premium, was sent to the agent, who had authority to waive said provision of the policy, and he tendered them to the applicant and demanded payment of the note; that an excuse for nonpayment being given, the agent left the policy with the applicant, but retained the note and the receipt, and afterwards left the note with a bank for collection and directed it to deliver the receipt on payment being made; that thereafter, at the request of the applicant, the time for payment of the note was extended, but the extension was made as an extension of the time for payment of the premium; and that the applicant died without paying the note — it is *held* that there was an entire failure to prove any agreement that the note should be taken in payment of the premium, and that a verdict for defendant should have been directed.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Action to recover on an insurance policy. One Harris, a general agent of the defendant insurance society, took Donald McDonald's application for life insurance therein for $5,000, the application being accompanied by the applicant's note for $315.25, the amount of the first premium, payable ten days after the date thereof to the order of the assurer. On the margin of the note were these words: "To be returned if not accepted by P. S. L." The application contained this provision: "The assurance hereby applied for shall not become binding upon the society until the first premium due thereon has been actually received by said society or its authorized agent during my lifetime and good health." The application also contained an interrogatory indicating that by actual payment of the first premium at the time of making the application the insurance would take effect from that time in event of the risk being accepted. This is the interrogatory: "What cash instalment has been paid to make the assurance herein applied for binding from this date, providing the risk is assumed by the Society?"

For an answer there were underwritten the letters "C. O. D." The risk was accepted and the policy was issued accordingly and sent to the agent, Harris, for delivery to McDonald, with a voucher to be also delivered to him on his paying the first premium. Harris, within a few days after receiving the policy and voucher, tendered them to McDonald and demanded payment of the note. The note was not paid, McDonald excusing nonpayment by saying that his wife was not yet satisfied with his taking the insurance. Harris left the policy with McDonald, keeping the note for collection, and the voucher. He thereafter deposited the note in the First National Bank of Wausau for collection, and delivered the voucher to the bank for McDonald in the event of his paying the note. Thereafter, at McDonald's request the time for paying the note was extended to November 15, 1898. On the 23d day of November, 1898, McDonald died. The note had not been paid. The assurance society had no knowledge of the existence of the note. After the death of the assured the society discovered the existence of the note and caused it to be tendered to plaintiff, the beneficiary under the policy, and a demand to be made upon her for a return of such policy, which demand was refused. All the conditions precedent to a recovery on the policy were performed, if it was in force at the time of McDonald's death, and this action was commenced to enforce payment. It was pleaded as a defense, among other things, that the first premium on the policy was not paid or payment thereof waived, and that the policy never went into effect.

The facts above detailed were established on the trial. There was evidence by Harris, and other evidence, tending to show that the policy was delivered to McDonald merely for his examination. The court refused to allow any explanation of the memorandum on the note except as to the meaning of the letters "P. S. L." and that they stood for the name of the assurance society. Harris explained the

circumstance of his taking the note by saying that he wanted "to tie McDonald up." At the close of the evidence defendant's counsel moved the court to direct a verdict in its favor, which was denied, due exception being taken thereto.

The jury rendered a special verdict in substance as follows: The policy was manually delivered by Harris to McDonald November 3, 1898. Such delivery was made with the understanding that the policy should from that time stand as a completed insurance contract. The note was accepted as a payment of the first premium. Harris, on behalf of the society, waived the terms of the policy providing that it should not go into effect until payment of the first premium.

A motion to set aside the verdict and for a new trial was denied, and the ruling duly excepted to. Judgment was entered on the verdict.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

For the respondent there was a brief by *Bump, Kreutzer & Rosenberry*, and oral argument by *M. B. Rosenberry*.

MARSHALL, J. Several assignments of error which are discussed at considerable length in the briefs of counsel do not need attention because of the conclusions we have reached on the main question in the case, that is, whether the note was taken in payment of the first premium upon the policy. We shall discuss that question, assuming for the purpose of it that the policy was delivered to McDonald to be retained by him.

It is conceded that Harris was a general agent of the society, not a mere local agent, and as such had authority, at the time of the delivery of the policy, to bind his principal by an agreement waiving the provision of the policy calling for actual payment of the first premium thereon as a condi-

tion precedent to its going into effect; so we need not take time to discuss any question in that regard. The authorities are in substantial harmony in respect to the subject. Joyce, Ins. § 77, and notes. It is also conceded that the condition of the policy, as to its not going into effect in advance of actual payment of the first premium, is fatal to plaintiff's right to recover unless it was waived by the assurer through its agent, Harris, and that whether there was such a waiver depends on whether McDonald and Harris expressly agreed that the former's note, given with his application for the insurance, should operate as such payment. The trial court rightly so held, though several dependent questions were submitted to the jury for decision in addition to one covering the vital point in the case. The jury found in plaintiff's favor on such point, also that down payment of the first premium was waived. That is, they said the note was taken by the society as a down payment of the first premium, and that such payment was waived. The literal sense of the language used in the two findings is conflicting; but it is reasonable to suppose that the jury intended to say that payment of the first premium in money was waived and that the note was taken in lieu thereof. We so interpret the verdict.

It follows that a negative answer to this simple question requires a reversal of the judgment appealed from: Was there any credible evidence tending to show that it was expressly agreed between McDonald and Harris that the former's note should be considered as an actual payment of the first premium upon the policy? It has sometimes been said in legal actions that where there is any evidence to establish the existence of a fact and there is also evidence to the contrary, a question is presented for solution by a jury, and that their determination, affirmed by the trial court by a refusal to set aside the verdict and grant a new trial, cannot be disturbed on appeal. That is misleading as the language is

often understood. Evidence does not tend to establish a fact in a legal sense unless it reasonably points to the probable existence thereof, and so as to produce conviction, to a reasonable certainty, in the mind of a person of common sense, that it does exist. Facts can properly be determined by a jury only by applying human reason and common sense to evidence. Every such determination should be based on reasonable probabilities established by evidence, not on mere possibilities or conjectures. *O'Brien v. C., St. P., M. & O. R. Co.* 102 Wis. 628.

In considering this case there must be kept prominently in mind the settled rule that the taking of a note for the debt of the maker, whether such debt be created at the time of such taking or prior thereto, *prima facie* makes the note only evidence of the indebtedness, and that such rule must prevail in the absence of evidence establishing an express contract making the note a payment of the debt. *Aultman & Co. v. Jett*, 42 Wis. 488. There must also be kept prominently in mind the rule that an express contract is one where the parties to it state in writing or verbally the terms thereof. 1 Parsons, Contracts (8th ed.), 7, note 1. Such a contract can only be established by evidence sufficient to produce conviction, to a reasonable certainty, that the terms of it were stated between the parties and agreed upon,— not conviction in the mind of a reviewing court, but in the mind of any person exercising common sense to discover the truth from the evidence.

Applying the rules indicated, we have been unable to discover in the record any evidence to support the finding of the jury that an express contract as to the taking of the note in payment of the first premium upon the policy was made. There was not a word of evidence from the mouth of any witness to that effect, nor any circumstance that is not just as consistent with the view that the note was taken as mere evidence of indebtedness, as with the view that it

was taken as payment of the premium. The burden of proof to establish the claim that the note was received as a payment of the premium was on plaintiff, and, while an express contract may be established in whole or in part by circumstantial evidence (*Leitgabel v. Belt, ante*, p. 107), mere circumstances that point one way as reasonably and significantly as the other are insufficient for that purpose. In such a situation the controversy should not be submitted to the jury. It involves a question calling for the exercise of the judicial function to declare the right as a matter of law. But if the question is submitted to a jury and they be permitted to guess or conjecture as to where the truth lies, if the result is contrary to the legal conclusion which the court should declare, it ought not to be allowed to stand as a correct determination of the rights of the parties. *Hyer v. Janesville*, 101 Wis. 371; *Cawley v. La Crosse City R. Co.* 101 Wis. 145. It is often said, and is the settled law, that where there is but one reasonable inference it is the duty of the court to draw it as a matter of law; but where the evidence will admit of conflicting reasonable inferences the proper inference is to be drawn by the jury. It is just as true that, where there are conflicting reasonable inferences and the situation will not reasonably admit of a decision that those pointing one way preponderate over those pointing the other, as a matter of law the case, from the standpoint of the party on whom the burden of proof rests, fails, and the question presented for decision is one of law for the court.

Counsel for respondent point with confidence to the memorandum on the note to the effect that it was to be returned if not accepted, and the evidence that the note was taken "to tie McDonald up." Neither such circumstance nor such evidence shows or tends to show that the parties expressly agreed that the obligation to pay should be deemed an actual payment. Such evidence, direct and circumstantial, at most indicates an agreement that McDonald would pay the first

premium at the due date of the note,—not that the note should be equivalent to such payment. That such was the actual understanding is evidenced by the fact that the customary receipt for the first premium, given to policy holders upon making payment thereof, was retained by Harris with the note to be delivered to McDonald upon his paying the same. The evidence shows that the extension of the time for payment of the note to November 15, 1898, was made as an extension of time for payment of the first premium upon the policy. The bank that held the note for collection was informed by Harris that the time for the payment of *the first premium* was extended to November 15th, and at the same time the receipt referred to was delivered to the bank with directions to turn it over to McDonald upon his paying the note. The provision in the policy, postponing its effect as an insurance contract till payment of the first premium, contemplated a delivery of the policy to McDonald subject to such provision, so that in case of payment of the first premium not being made till a later day the liability of the society would be postponed accordingly. So the delivery of the policy in advance of payment of the first premium does not point to the probability of a waiver of the provision that the liability under such policy should not antedate actual receipt by the society of such premium in money, nor does any other evidence that we can find in the record.

Further discussion of the case seems to be unnecessary. As we view the evidence there was an entire failure of proof to show that Harris and McDonald agreed that the note should be considered as a cash payment of the first premium or in lieu of such cash payment, hence that the motion of appellant for the direction of a verdict should have been granted.

By the Court.—The judgment appealed from is reversed, and the cause remanded for a new trial.

BRITTINGHAM & HIXON LUMBER COMPANY, Appellant, vs. MANSON, Respondent.

November 1 — November 16, 1900.

Logs and lumber: Sale: Construction of contract.

Plaintiff, dealing extensively in lumber, needed to have engagements in advance for large quantities to meet its trade and contracts. Defendant, who owned a mill and the timber on a large tract, was unwilling to sell the standing timber, but was willing to negotiate for the manufacture and sale of all the product thereof. With a mutual understanding of these facts, they made a written contract by which defendant sold to plaintiff all of the merchantable lumber "that shall hereafter be cut and manufactured from the timber to be cut, logged, and removed from" the tract mentioned, "which said timber upon said lands is and was estimated at seventeen million feet, more or less." The contract provided that "the lumber hereby sold . . . shall be cut and manufactured at" defendant's mill "within three years from this date, in about equal amounts of one third to be manufactured each sawing season for the years 1898, 1899, and 1900, and delivered each year: provided that in case said mill should be destroyed by fire . . . the said lumber, or the amount then remaining unmanufactured, shall be manufactured at some other suitable mill." Payment was to be made by plaintiff, first, of the contract price of the standing timber to the parties from whom defendant had purchased it; second, the advances made by one W. for its logging and manufacture; and the balance to defendant. A man was to be employed to look after the grading and shipping of the lumber, his wages to be paid one half by each party; and the lumber was to be manufactured under the direction of plaintiff, provided that such direction should not interfere with the cutting capacity of the mill. During each of the years 1898 and 1899 the defendant manufactured and delivered substantially one third of the total amount of lumber contained in all of said timber, but thereafter refused to manufacture and deliver the remainder. *Held*, that the contract was for the sale of all the timber capable of being manufactured from the entire body of lumber described, and plaintiff was entitled to recover its damages for the breach thereof.

108	221
110	565
108	221
113	166
113	170
108	221
116	307
116	553
108	221
117	567

APPEAL from an order of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Reversed.*

Appeal by plaintiff from an order sustaining a general demurrer to the complaint, which set forth substantially the following facts:

Plaintiff was engaged in an extensive wholesale and retail lumber business, in which it was its custom to contract for and purchase large quantities of lumber, in order that it might have in advance a fixed and sufficient supply to meet its trade and contracts, to the knowledge of the defendant. Prior to September 13, 1897, plaintiff endeavored to purchase from defendant all of the pine timber upon the lands described in the contract hereafter mentioned. Defendant was unwilling to sell the standing timber, but expressed a willingness to negotiate for the manufacture and sale of all of the product thereof. After sundry negotiations therefor, a written contract was entered into between the parties on October 14, 1897, whereby the defendant, as party of the first part, granted and sold to plaintiff, party of the second part, "all of the merchantable white pine and Norway lumber, lath, and shingles, which are to be manufactured and piled in the mill yard at the Manson mill, in Wausau, Wisconsin, that shall hereafter be cut and manufactured from the timber to be cut, logged, and removed from the lands known," etc. (description), "which said timber upon said lands is and was estimated at seventeen million feet, more or less. . . . That the lumber hereby sold and purchased by the party of the second part shall be cut and manufactured at the Manson mill, in the city of Wausau, Marathon county, Wisconsin, within three years from this date, in about equal amounts of one third to be manufactured each sawing season for the years 1898, 1899, and 1900, and delivered each year: provided, that in case said Manson mill should be destroyed by fire, or rendered otherwise unfit for the manufacture of said lumber, the said lumber, or the amount then remaining unmanufactured, shall be manufactured at some other suitable mill in Wausau, Wisconsin."

The contract then provided for piling, measuring, and inspecting the lumber, and for payment by the purchaser, first, of the contract price of the standing timber to the parties from whom the defendant had purchased it; second, to one Warne such sum as defendant might owe him for advances for logging, etc.; and the balance to defendant. Also, that a man should be employed to grade and look after the shipping of the lumber, and look after the mutual interests of each party; his wages to be paid one half by each. Further, that the lumber should be manufactured under the direction of plaintiff, provided that such direction should not interfere with the cutting capacity of the mill.

On the same day another contract was made between the same parties, which is set out in the complaint, reciting "that whereas the said *Manson* has this day entered into a contract with said lumber company for the sale of a quantity of lumber, by contract in writing bearing even date herewith," wherefore a price was made at which said *Manson* would load and grade the lumber.

The defendant, in pursuance and part execution of the contract, cut, logged, and manufactured into lumber, lath, and shingles, and delivered, during the years 1898 and 1899, about 12,500,000 feet of such timber, and in addition thereto, and prior to March 1, 1900, cut, logged, and removed from the lands about 4,000,000 feet, leaving standing thereon about 5,000,000. The 4,000,000 feet cut and removed, but not sawed and delivered, contained about 5,000,000 feet of merchantable lumber, and about 2,000,000 pieces of lath and shingles. The remaining standing timber contained about 6,000,000 feet of merchantable lumber, and about 2,000,000 feet of lath and shingles. On the 26th day of March defendant repudiated the contract, and refused to manufacture or to deliver to plaintiff any of the timber so cut and removed by him, and refused to cut or manufacture any of that remaining on the land, and about that time conveyed away said logs and standing timber, as also his mill.

The complaint alleges that up to the time of said breach defendant at all times, in conversation and correspondence, assumed that he was bound to deliver to plaintiff all of the lumber, lath, and shingles contained in all of the pine timber which stood upon the lands at the time of making the contract. The price of lumber, etc., mentioned in the contract has continuously been higher since the beginning of the sawing season of 1898 than the prices specified in said contract, and by reason of the breach the plaintiff has sustained damages in the sum of $50,000, recovery of which is prayed.

For the appellant there was a brief by *Olin & Butler*, attorneys, and *Mylrea & Bird*, of counsel, and oral argument by *H. L. Butler* and *C. B. Bird.*

For the respondent there was a brief by *Ryan, Hurley & Jones*, attorneys, and *Van Hecke & Smart*, of counsel, and oral argument by *T. C. Ryan* and *M. A. Hurley.*

DODGE, J. The respective parties present antagonistic views as to the force and effect of the contract set forth in the complaint. The plaintiff contends that thereby defendant agreed to deliver to it all of the lumber, lath, and shingles which could be manufactured from all of the timber upon the lands mentioned, within three years from the date of the agreement, approximately one third each year, so that it was an entire contract to deliver to it, in approximately equal thirds in each of these three years, the entire product of all the pine timber,—so definite in its scope and time of performance that breach thereof gave an immediate right of action for damages, to be measured by the difference between the contract price and market value of any portion of such lumber which remained undelivered. Defendant, on the other hand, contends that this is merely a contract binding the plaintiff to receive and pay for any lumber which the defendant might elect to manufacture from the standing timber in question, but binding the defendant to deliver

only such as, in his election, he might choose to manufacture, and at such times as he might so choose, and therefore terminable at his will, without liability for damages.

The most important rules for the construction of contracts are: The primal and all-important object in the consideration of any written contract is to ascertain the intention which the parties actually had and sought to express. In the effort to reach such result, all parts of the contract must be taken into consideration with reference to each other, and, if possible, such an interpretation of each part be adopted as will be consistent with and give effect to every other part. The intention of the parties must be ascertained from the language of the contract itself, but it is proper and often necessary that the court should be informed as to the subject matter contracted about, the relation of the parties thereto, and the circumstances surrounding the transaction,—in other words, should be placed in the same position that the parties occupied when the contract was put in words, so as to be able to view the terms thereof in the same light in which the parties did. *Robson v. Miss. River L. Co.* 43 Fed. Rep. 369; *U. S. v. Peck*, 102 U. S. 64; *Lyman v. Babcock*, 40 Wis. 503; *State ex rel. Heiden v. Ryan*, 99 Wis. 123. In *Lyman v. Babcock*, *supra*, it was said: "Whatever, therefore, indicates the nature of the subject, is a just medium of interpretation of the language and meaning of the parties in relation to it, and is also a just foundation for giving the instrument an interpretation, when considered relatively, different from that which it would receive if considered in the abstract." In the *Heiden Case*, as to the construction of statutes, it was said: "Uncertainty of sense, requiring judicial construction, does not always spring from uncertainty of expression. Words may be plain, yet their literal meaning lead to such consequences that courts must necessarily violate the letter in order to reach the real spirit of the law and give effect to the legislative will."

In the light of the last of the three rules of construction above stated, it becomes proper to consider the allegations of the complaint as to the situation of the parties at the time of making the contract. From those it appears that the plaintiff, a lumber dealer, was under the necessity of having engagements reasonably definite for considerable amounts of lumber in advance, for the purposes of its business; that the defendant was the owner of this tract of timber and of a mill; that he was unwilling to sell the timber alone, but desired to dispose of it in such a manner as to utilize his mill property; and that the parties met and negotiated upon mutual understanding of those circumstances. From this foundation, proceeding to the contract set out in the statement of facts above, it is well-nigh inconceivable that the plaintiff would have entered into a contract whereby, entirely at the caprice of the defendant, it might have forced upon it a wholly unknown quantity of lumber, varying from a mere trifle to the entire capacity of defendant's mill, which, from the allegations of the complaint, appears to have equaled or exceeded 6,000,000 feet per season, without any notice beforehand to enable it to graduate its contracts for sales according to the lumber to be received. Further, the knowledge of this situation gives especial cogency and significance to the provisions of the contract declaring that the timber in contemplation amounted to about 17,000,000 feet, and that the same should be cut and manufactured within three years, and that approximately one third thereof should be so manufactured and delivered each year. These latter elements of the contract, the respondent insists, may be considered so insignificant and their presence so accidental as to justify the court in ignoring them altogether as surplusage. It is entirely possible that words in a contract inconsistent with others may so clearly appear to have been carelessly used or to serve no important purpose that a court need not hesitate in giving an apparently correct interpre-

tation to the other words inconsistent therewith. But, in weighing the relative importance of conflicting provisions, the situation of the parties is specially significant, and in the present case leaves no room to doubt that the stipulations as to time and rate of delivery were most carefully considered and deemed highly important by both parties. Upon them the plaintiff must regulate its commercial business, and defendant the operation of his mill and the size of his logging outfit.

Defendant's position, that the words, "all the merchantable lumber that shall hereafter be cut and manufactured from the timber to be cut and removed from the lands in question," means only such as shall happen to be manufactured in his election, be it little or much, is absolutely inconsistent with the above-mentioned provision that "the lumber hereby sold and purchased by the party of the second part shall be cut and manufactured at the *Manson* mill within three years from this date, in about equal amounts of about one third to be manufactured each sawing season for the years 1898, 1899, and 1900." Those words, if used deliberately in this contract, as we are convinced they were, could not have been used unless the minds of the parties had already settled upon the proposition that an approximately definite aggregate of property had been sold by the previous words; otherwise, the phrase is wholly incapable of enforcement, for the plaintiff could not establish, at the end of the sawing season in any of the three years named, whether it had been complied with or not. No breach could be predicated if it got but 1,000 feet of lumber in either of those years. Again, the provision that "in case of the destruction of said *Manson* mill the said lumber, or the amount then remaining unmanufactured, shall be manufactured at some other suitable mill," is wholly meaningless, unless the parties understood that some definite and specified lumber had been sold and was to be manufactured.

Especially significant are the words, "or the amount then remaining unmanufactured;" for, if no particular amount had been sold, then there could be no amount to remain unmanufactured. The effect of these provisions, without considering others, is to establish beyond reasonable doubt that the earlier words in the contract did not mean a wholly uncertain, indefinite, or accidental amount of lumber, but did mean a quantity of lumber reasonably ascertained in identity and amount. That view being reached, all of the other clauses of the contract fall into harmony, and are consistent with a well-understood purpose and intent of both parties in making the contract. Then becomes intelligible and significant the estimate of 17,000,000 feet; the provision as to the division of the payments for all of said lumber, whereby is to be paid, first, the stumpage price to the parties from whom defendant purchased it; second, the advances made by one John Warne for its logging and manufacture; *and the balance* to defendant. Then it is possible to believe that intelligent men would agree to hire and share the wages of a man to look after the shipping and grading, and insert the provision that the plaintiff should have the right to direct the process of manufacture, with no limitation except that it should not interfere with the cutting capacity of the mill. This last proviso, obviously included in the contract at defendant's instance, is extremely significant of his understanding that he had contracted to cut and deliver a large and reasonably definite quantity of lumber, and was willing to surrender the direction as to how his mill should work thereon, provided it did not diminish its earnings by lessening its output. It is utterly inconsistent with his counsel's theory that manufacturing was intended to be entirely optional with defendant, for it vests option in plaintiff.

If we are correct thus far, namely, that the words of grant in the contract were intended by both parties to describe some definite and ascertainable quantity of lumber, sold by

defendant to plaintiff, it only remains to ascertain what that quantity was. That is not difficult, in the light of the surrounding circumstances. There is nothing to indicate any other quantity or volume than the lumber to be obtained from *all* of the timber standing on the lands in question. The estimate which had previously been made of such timber; the attachment and incorporation in this agreement of the contracts with the parties from whom defendant had purchased the stumpage, and to whom plaintiff was to pay the price thereof out of the lumber delivered; indeed, the very designation of the land from which such timber was to be cut,—all these indicate that quantity, and no other. Further, and most cogent as bearing upon defendant's understanding, is the fact that in each of the years 1898 and 1899 he did deliver substantially one third of the total amount of lumber contained in all of said timber. Much stress is laid by the circuit judge, in an opinion filed by him, upon the fact that the quantity, approximately 6,000,000 feet per year, was an extraordinary quantity for one establishment to handle, and therefore improbable. He must have overlooked the fact, alleged in the complaint, that for two of the contractual three years defendant's mill did handle such amount. Whether it was run exclusively upon this timber or not is not alleged, but certainly the contract, thus construed, was not in excess of the capacity of defendant, either in logging or in manufacturing.

A contract having many elements of similarity with the one now before us was considered by Judge SHIRAS in *Robson v. Miss. River L. Co.* 43 Fed. Rep. 364, and again, after judgment, in 61 Fed. Rep. 893. There a contract by a log-driving and booming company with the owner of considerable tracts of lands tributary to their river provided that they should drive logs for him, not exceeding a specified amount each year, at a given price. The facts of the situation were recited under a "whereas" in the contract. There

was no specification as to the duration of the contract or as to the quantity; but the court held, from the situation alone, that it was a contract to drive and boom all the logs which the plaintiff had upon his then-owned premises; and upon a repudiation thereof while he still had some 40,000,000 feet undriven, part cut and part not yet cut, he was held entitled to recover as damages the increased expense imposed upon him for driving and booming his remaining logs,—both those which he had cut and tendered at the river, and those which still remained standing.

In the view we have taken of the necessary construction of the words used in this contract in the light of the surrounding circumstances, it becomes immaterial to consider the question — much discussed by defendant — whether the contract, upon his interpretation thereof, would be of any validity; whether it would contain any element of obligation on defendant's part sufficient to constitute mutuality. Suffice it to say that in the two very recent cases of *Hoffman v. Maffioli*, 104 Wis. 630, and *Teipel v. Meyer*, 106 Wis. 41, neither of which is cited by counsel, the subject of mutuality necessary to the validity of contracts, and the authorities bearing thereon, are so fully discussed that respondent's citation of numerous decisions from other states was hardly necessary.

Conceding that the contract as interpreted by respondent would be valid, we find that interpretation violative of the most important stipulations of the writing itself, inconsistent with the situation and needs of the parties, and opposed to their obvious purpose and intention. On the contrary, the language of that writing, in the light of the conditions under which it was used, declares a meeting of minds upon an agreement for the purchase and sale of all the lumber capable of being manufactured from the entire body of timber described. Such being the contract, the complaint clearly alleges a completed violation thereof by defendant,

and resulting damage to plaintiff. The contract, its breach, and damages therefrom, are facts sufficient to constitute a cause of action. The demurrer was erroneously sustained.

By the Court.— The order of the circuit court is reversed, and the cause remanded with directions to overrule the demurrer.

BRANDT, Appellant, vs. THE BERLIN FARMERS' MUTUAL FEUER & BLITZ VERSICHERUNGS COMPANY, Respondent.

November 2 — November 16, 1900.

Fire insurance: Property "on premises."

At the time of the issuance of a fire insurance policy, under sec. 1931, Stats. 1898, covering hay and grain "on premises," the insured had hay and grain on the premises mentioned in his application, and had no other premises. Afterwards, still retaining such premises and having hay and grain thereon, he rented a farm in another section, and his hay and grain on the latter were destroyed by fire. *Held*, that the policy did not cover such loss.

APPEAL from a judgment of the circuit court for Marathon county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

Defendant, a town mutual fire insurance company, on May 17, 1898, issued to plaintiff its policy, to run for five years, upon real and personal property, to wit: Dwelling house, $600; furniture and clothing, $100; surplus produce, $25; stables, $60; hay, fifteen tons, $90; grain, $50; two horses, $132,— and other articles and stock. The policy was based upon an application in which the same items of property are set forth, and which contained the direction: "Exposures: Describe the relative situations of the buildings to be insured, and all other dangers within seventy-five feet." Also, "Make a diagram of the situation upon the other side of this sheet." The diagram was of section 32, town 30,

range 6, divided into forty-acre parcels, upon which a stable and house were marked as in the S. W. ¼ of the S. W. ¼. At date of policy and thereafter plaintiff owned and resided at the place designated on the plat, and had there articles equivalent to the descriptions in the policy and application. The following year he rented in addition the Burmeister farm, situated in section 30, something more than a mile away, and raised crops thereon, including hay and grain, which were stored in the buildings on the rented premises, and which on August 23, 1899, were destroyed by fire resulting from lightning, to an amount exceeding the items of hay and grain specified in the policy. The only question raised on appeal is whether the policy covered hay and grain so situated. The court directed a verdict for defendant, from judgment on which plaintiff appeals.

For the appellant there was a brief by *L. Marchetti*, attorney, and *Mylrea & Bird*, of counsel, and oral argument by *Mr. Marchetti* and *Mr. W. H. Mylrea.* They cited *Bowers v. Pomeroy*, 21 Ohio St. 190; Anderson, Law Dict. "PREMISES;" Black, Law Dict.; *Sawyer v. Dodge Co. M. Ins. Co.* 37 Wis. 503; *Noyes v. N. W. Nat. Ins. Co.* 64 Wis. 415.

For the respondent there was a brief by *Bump, Kreutzer & Rosenberry*, and oral argument by *M. B. Rosenberry.* They cited *N. W. M. L. Ins. Co. v. Germania F. Ins. Co.* 40 Wis. 446; *Amos v. Fond du Lac*, 46 Wis. 695; Joyce, Ins. § 1748 *et seq.; Mead v. Phenix Ins. Co.* 158 Mass. 124; *Benton v. Farmers' M. F. Ins. Co.* 102 Mich. 281.

DODGE, J. Sec. 1931, Stats. 1898, prohibits town insurance companies from insuring "any property other than detached dwellings and their contents; farm buildings and their contents; live stock in possession or running at large; farm products on premises, and farming implements." This statute, of course, entered into and became part of every policy written by the respondent; and the present policy

insures, therefore, "hay on premises" and "grain on premises." At the time of the policy, appellant had hay and grain on the premises mentioned in his application. At the time of the loss he had hay and grain on those premises, and also other hay and grain on other premises. It seems too obvious for much debate that the words "on premises," by statute incorporated into the contract, if they have any force at all, must have been understood and intended to apply to the premises then in contemplation of the parties. At that time there was no room for ambiguity, for appellant had no other premises. The words are restrictive. But for them, a contract to insure appellant against loss by fire to his hay or grain would be personal, and not affected by considerations as to where the property might be. *Sawyer v. Dodge Co. M. Ins. Co.* 37 Wis. 503. Thus understood, the contract, when written, insured hay and grain on those premises and nowhere else. Purchase or leasing of other premises by appellant a year afterwards could not change the meaning of the contract already in existence, when no such act was in contemplation of the parties at the time of contracting. The policy meant the same thing in August, 1899, as in May, 1898, and excluded from its terms farm produce elsewhere than on the premises in section 32. The construction contended for by appellant would give him insurance against double risk at the price paid for single risk by his fellow policy holders,—a result too unfair and unreasonable to permit belief that either the policy or the statute contemplates it. The conclusion of the court below that appellant's loss was not covered by the policy sued on was correct.

By the Court.—Judgment affirmed.

In re Estate of McCormick.

November 2 — November 16, 1900.

Adoption of children: Jurisdiction: Petition: Finding as to abandonment: Presumptions.

1. A petition for leave to adopt a child, under sec. 4021, Stats. 1898, may be sufficient to give the county court jurisdiction of the proceeding, although it fails to state all the facts essential to authorize such adoption and even fails to state the name or residence of either parent.
2. Under sec. 4022, Stats. 1898, an order of adoption, made without the consent of the living parents or either of them, cannot be upheld on the ground that they had abandoned the child unless that fact was judicially determined and found by the county court. A subsequent finding of that fact by another court is of no avail; and there can be no presumption that the county court so found, where the record is silent as to the fact.

Appeal from a judgment of the circuit court for Marathon county: W. C. Silverthorn, Circuit Judge. *Reversed.*

For the appellants there were briefs by *Carl H. Mueller*, attorney, and *Ryan, Hurley & Jones*, of counsel, and oral argument by *T. C. Ryan* and *M. A. Hurley*.

For the respondent administrator there was a brief by *Louis Marchetti*, attorney, and *Mylrea & Bird*, of counsel, and oral argument by *Mr. W. H. Mylrea*, *Mr. C. B. Bird*, and *Mr. Marchetti*. They contended, *inter alia*, that the objections to the order of adoption on the ground that there was no notice to or consent of the parents only go to the jurisdiction of the person of the parents and can only be raised by them. *Schiltz v. Roenitz*, 86 Wis. 31; *Parsons v. Parsons*, 101 Wis. 81; *Mohr v. Porter*, 51 Wis. 487; *O'Dell v. Rogers*, 44 Wis. 136; *Melms v. Pfister*, 59 Wis. 186; *Weld v. Johnson Mfg. Co.* 84 Wis. 537; Van Fleet, Collateral Attack, § 408; *Nugent v. Powell*, 4 Wyo. 173, 20 L. R. A. 199.

CASSODAY, C. J. This is an appeal from a judgment of the circuit court entered January 3, 1900, affirming an order of the county court entered May 9, 1899, appointing *Carl Kronenwetter* as administrator of the estate of Ellen McCormick, deceased. The order was made on the petition of Emory McCormick, claiming to be a son by adoption of Ellen McCormick, who died intestate March 18, 1899. Her husband, Thomas McCormick, died testate December 3, 1898. The facts in relation to such adoption, as appears from the record, are to the effect that December 20, 1880, Thomas and Ellen McCormick presented to the county court their verified petition that they were husband and wife, and were residents of the town of Easton, in Marathon county, and were desirous of adopting a child not their own by birth, to wit, Emory Brown, who was then an infant under the age of fourteen years, and was six years old; that John T. Callon and John Patzer, as guardians, had given their written consent to such adoption; that the petitioners were of sufficient ability to bring up the child and furnish him suitable nurture and education, having reference to the degree and condition of his parents,—and praying for such adoption and the change of the child's name accordingly. Such written consent of Callon and Patzer accompanied the adoption, and recited that they were such guardians of Emory, who was six years of age, and was signed by them as "Poor Committee of Marathon County, Wis.," and bore date December 16, 1880. Neither the petition nor such consent named the father or mother of Emory or their residence. Upon such petition and consent the county court made and entered an order June 8, 1881, reciting that Emory Brown was an infant under fourteen years of age, and was six years of age; that Thomas and Ellen McCormick were desirous of adopting him as their child; that "John Callon and John Patzer, guardians and poor commissioners," had given their consent in writing to such adoption; that the court was satisfied

with the identity and relations of the persons and that the petitioners were of sufficient ability to bring up and furnish suitable nurture and education for the child, having reference to the degree and condition of its parents; and that it was proper that such adoption should take effect. Thereupon it was ordered that from and after the date thereof Emory Brown should be, to all legal intents and purposes, the child of the petitioners, Thomas and Ellen McCormick; that the name of the child be changed to Emory McCormick, according to the prayer of the petition. Such order fails to give the name or residence of either the father or mother of the child.

It appears in evidence that Emory's father and mother were divorced November 14, 1881; that July 10, 1893, Thomas McCormick made his last will and testament, wherein he gave and bequeathed to his adopted son, Emory McCormick, five dollars, and gave, devised, and bequeathed all the balance of his property to his wife, Ellen; that December 3, 1898, Thomas McCormick died, and thereupon such will was filed and admitted to probate; that March 18, 1899, Ellen died intestate; that March 21, 1899, Emory, as such adopted son, presented to the county court his verified petition for such appointment of such administrator of the estate of Ellen McCormick, deceased.

The trial court found, in effect, that Ellen McCormick died intestate, leaving property in the county; that the appellants were her brothers and sisters; that she left, her surviving, no husband or natural children nor child, and that the petitioner, Emory Brown (McCormick), was the duly and legally adopted son of Ellen,—and, as conclusions of law, that the county court properly granted the administration of her estate to the person so requested by him. The circuit court based such findings wholly upon a certified copy of the proceedings of the county court. From the judgment entered thereon accordingly, affirming the order of the

county court appointing such administrator, the brothers and sisters of Ellen bring this appeal.

The statute provides that the "administration of the estates of intestates shall be granted to some one or more" of the relatives therein named, and the order of their appointment, "as the county court might think proper, *or to such person as* the widow, surviving husband or *next of kin may request* to have appointed, if suitable and competent to discharge the trust." Stats. 1898, sec. 3807. Here the administrator was appointed on the petition and at the request of Emory Brown (McCormick) on the ground that he was the legally adopted son of Thomas and Ellen McCormick. The question recurs whether he was such legally adopted son. The appellants contend that the petition of Thomas and Ellen McCormick for the adoption of Emory was insufficient to give the county court jurisdiction, for the reason that it failed to state all the facts essential to authorize such adoption. The petition is far from being a model. It even fails to state the name or residence of Emory's father or mother. Nevertheless we are constrained to hold that it was a sufficient compliance with the statute to give the county court jurisdiction to hear proof in the matter of the adoption of the child. Sec. 4021. But that did not authorize that court to order or adjudge such adoption in violation of the next section of the statute. Sec. 4022. That section declares that "no such adoption shall be made without the written consent of the living parents of such child unless *the court shall find* that one of the parents has *abandoned* the child or gone to parts unknown, when such consent may be given by the parent, if any, having the care of the child." It further provides, in effect, that in case the parents are living and "have abandoned the child such consent may be given by the guardian of such child, if any," and "that, unless the living parent or parents of a minor consent to such adoption, it shall be the duty of the court having jurisdiction"

to appoint a time and place for hearing such petition, and give notice thereof as prescribed. The substance of the order of the county court adopting the child is given above in the statement of facts. It does not find that the parents of the child, or either of them, had abandoned the child,—much less that they, or either of them, were dead. It does not even mention the name or residence of either of them, and yet it appears from the record that they were both living in the county at the time; and there is no claim that they, or either of them, had notice of the proceedings, as required by the statute. Such being the facts, the order of adoption, based upon the abandonment of the child by the parents, was clearly a nullity as against them. *Schiltz v. Roenitz*, 86 Wis. 31.

Such want of notice to the parents, however, did not take away the jurisdiction of the county court to determine whether the parents had in fact abandoned the child. *Parsons v. Parsons*, 101 Wis. 76, 81, 82. In that case it was said by my brother MARSHALL, speaking for the court, in effect, that "the fact of abandonment, judicially determined, was essential to the jurisdiction" of the court to order or adjudge such adoption. 101 Wis. 79. In that case the fact of abandonment was so judicially determined. In the case at bar it was not so determined. The statute quoted expressly prohibited such adoption on the ground of abandonment, without the fact of abandonment being found by the county court. To obviate the objection, it is said that the circuit court did find such abandonment. But that does not give life to such adoption by the county court without any finding of such abandonment. Counsel ask us to presume such finding by the county court, though never reduced to writing. It is true that in a certain class of cases, where the record is silent as to some fact, a presumption will be indulged in favor of the judgment. *Webb v. Meloy*, 32 Wis. 319; *Oakes v. Estate of Buckley*, 49 Wis. 592; *Mitchell v. Rolison*,

52 Wis. 155. But we are not aware of any such presumption in violation of an express statutory requirement, and in a proceeding which is purely statutory. If the facts were such as to obviate the express prohibition of the statute, they should have been found by the county court. We must hold that the county court, in granting such adoption, acted in excess of its jurisdiction. *State ex rel. Att'y Gen. v. Circuit Court*, 97 Wis. 1.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to reverse the order of the county court, and for further proceedings according to law.

SCOTT, Respondent, vs. HOBE, Appellant.

November 2—November 16, 1900.

Jurisdiction: State and federal courts: Consuls: Evidence: Immaterial error: New trial: Newly discovered evidence: Negligence.

1. The state courts have jurisdiction of actions against trading consuls or vice consuls of foreign nations concerning matters arising out of their business, there being no constitutional, statutory, or treaty provision vesting exclusive jurisdiction of such cases in the United States courts.
2. The admission of evidence of immaterial facts was not prejudicial where they had previously appeared in the case by evidence which was properly received.
3. The issue being whether plaintiff was to receive, for looking after defendant's vacant buildings, etc., compensation in addition to the use of one of such buildings as a dwelling rent free, the failure of defendant, previous to the trial, to interview a clerk employed by him in a store about six miles distant, at which plaintiff traded, to ascertain what such clerk knew concerning the case, is *held* such a lack of diligence as to justify the denial of a motion for a new trial based on an alleged discovery that plaintiff had made admissions to such clerk.

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

This is an action to recover the reasonable value of services claimed to have been performed by the plaintiff for the defendant between June 1, 1898, and April 6, 1899, in looking after and taking care of certain unused buildings near Clifford Station, Lincoln county, Wisconsin, and also in looking after certain lands of the defendant in that vicinity. The allegations of the complaint were denied by the answer, and the defendant alleged that the only services rendered by the plaintiff were rendered pursuant to an agreement that the plaintiff was to have one of the buildings as a dwelling house free of rent, in consideration of the care of all the buildings. The answer also alleged that the defendant was a citizen of Norway, and that he was and had been since 1883 vice consul of Sweden and Norway, residing at St. Paul, in the state of Minnesota, and that the state courts had no jurisdiction of the action on that account, but that the United States courts had sole jurisdiction of such actions.

It appeared by the evidence that the defendant had lived in the city of St. Paul since the year 1883, and that he was a citizen of Norway, and was the vice consul of Norway and Sweden, as alleged in the answer; that since 1887 he had been engaged in the lumber and land business, owning considerable tracts of land in various parts of Wisconsin, and operating at least one sawmill; that in May, 1898, he bought a considerable tract of land in the vicinity of Clifford Station, Lincoln county; that on this land and at the station there were a number of deserted buildings which had been used by the Clifford Lumber Company, consisting of a store building, a boarding house, some frame buildings, a blacksmith shop, etc., all of which were rough and unpainted. A mill had been operated by the Clifford Lumber Company at the station, which burned down in November,

1897. The defendant bought the land for the purpose of selling again.

It further appeared that the plaintiff was a log scaler and lumber estimator, and that he had worked for the Clifford Lumber Company; that in June, 1898, the plaintiff and defendant met at Clifford Station, and had some talk with regard to the plaintiff's looking after the deserted buildings and showing the land to prospective purchasers. The plaintiff claims that in this conversation it was agreed that the plaintiff should look after the property and that the wages would be agreed upon at a later time, and the defendant claims that the agreement was that if the plaintiff would look after the buildings he should have one house to live in free of rent. The plaintiff moved into the house and looked after the buildings and property until April, 1899. Considerable correspondence passed between the parties, which was all put in evidence.

The jury returned a verdict for the plaintiff for $374. The defendant moved for a new trial on exceptions to evidence and the charge of the court, and also on the ground of newly discovered evidence; but the motion was overruled and judgment entered for the plaintiff upon the verdict, from which the defendant appeals.

For the appellant there was a brief by *Curtis, Reid, Smith & Curtis*, and oral argument by *F. J. Smith.*

For the respondent there was a brief by *Flett & Porter*, and oral argument by *W. H. Flett.*

WINSLOW, J. It is insisted by the appellant that the state courts have no jurisdiction of this action, because the defendant is a vice consul of Sweden and Norway and can only be sued in the courts of the United States. The defendant was a trading consul, the action here brought is one which arises out of his business, and the principle of international law is that a trading consul is liable to the ordinary processes of

law in all that concerns his trade, in the same way as a native merchant. *Coppell v. Hall*, 7 Wall. 542. The defendant is therefore amenable to the jurisdiction of the state courts, unless that jurisdiction has been taken away by the constitution and laws of the United States,—for the state courts have jurisdiction unless it has been taken away; the United States courts have no jurisdiction unless it has been given. By the constitution of the United States, the courts of the United States were vested with judicial power extending to "all cases affecting ambassadors, other public ministers, and consuls," and in all such cases the supreme court was given "original jurisdiction." Const. U. S. art. III, sec. 2. A grant of original jurisdiction is not a grant of exclusive jurisdiction; hence there is nothing in the constitutional clauses just cited which deprives the state courts of jurisdiction. *Bors v. Preston*, 111 U. S. 252. By the judiciary act of 1789, however (R. S. of U. S. 1874, sec. 711, par. 8), exclusive jurisdiction was vested in the courts of the United States over "all suits or proceedings against ambassadors or other public ministers, . . . or against consuls or vice consuls." Under this act it was well settled that the jurisdiction of the United States courts was exclusive. *Davis v. Packard*, 7 Pet. 281; *Valarino v. Thompson*, 7 N. Y. 576. This paragraph was repealed by ch. 80 of the United States Statutes at Large, passed by the 43d Congress, approved February 18, 1875, so that there is now no constitutional or statutory provision vesting exclusive jurisdiction of such causes in the United States courts. In the absence of such provision, or of any treaty provision, the jurisdiction of the state courts seems unquestionable. The same result was reached in *Wilcox v. Luco*, 118 Cal. 639, 45 L. R. A. 579; and *De Give v. Grand Rapids F. Co.* 94 Ga. 605.

Passing to the merits of the case, the first contention made is that the verdict is contrary to the evidence. It must be sufficient to say with reference to this question that we have

carefully examined the evidence and are satisfied that there is sufficient evidence to sustain the verdict.

It is next contended that the judgment should be reversed on account of the erroneous admission of evidence. Upon the cross-examination of the defendant, plaintiff's attorney was allowed, against proper objection, to show that his (defendant's) land and lumber business was extensive; that he owned considerable amounts of land in various places in this state, and was manufacturing lumber at Knox Mills. This was clearly immaterial, and, if prejudicial, might necessitate reversal of the judgment. Substantially all these facts, however, had previously appeared in the case by evidence which was properly received; hence we do not see how it can be said that the defendant was prejudiced.

Finally, it is contended that a new trial should have been granted on the ground of newly discovered evidence. It appeared by affidavits filed that defendant had a store at Brantwood, six miles from Clifford, during the time that *Scott* worked for him, and that one Lind was defendant's clerk in the store, and that *Scott* did his trading there. Lind's affidavit shows that *Scott* had a conversation with him at Clifford in July, 1898, in which *Scott* told him that he (*Scott*) was to look after the buildings in consideration of the use of a house free of rent. The plaintiff filed an affidavit denying such statement *in toto*. The affidavits further showed that neither the defendant nor his attorneys had ever interviewed Lind to see if he knew any facts concerning the case previous to the trial. We think common diligence and prudence in preparing for trial would have suggested that Lind be interviewed to ascertain what knowledge he had concerning the matter. He was in defendant's employ, was within easy access, and had seen plaintiff frequently during his employment, and it would seem quite probable that he might have had some material conversations with the plaintiff. Such applications as this are not

regarded with favor for very obvious reasons. Before a new trial is granted the applicant must make out a case free from delinquency, and show that, notwithstanding he used all reasonable diligence in preparing his case, the newly discovered evidence escaped his search. *Edmister v. Garrison*, 18 Wis. 594. We do not think such a case was made here.

By the Court.—Judgment affirmed.

DAVIES, Respondent, vs. JEFFRIS and another, Appellants.

November 2 — November 16, 1900.

Logs and timber: Wrongful cutting: Quantity: Difference between full and merchantable scales: Judicial notice: Findings: Review on appeal: "Price."

1. The fact that a merchantable scale of pine timber, even of such as is practically all sound, is considerably less than the full scale, not being a matter of common knowledge, the courts cannot take judicial notice thereof.
2. In an action for the wrongful cutting of pine timber the preponderance of the evidence being to the effect that no deduction from the full scale was necessary to arrive at the merchantable scale, a finding as to the quantity for which defendants were liable, making little or no deduction for the difference between such scales, is sustained.
3. In such a case plaintiff's witnesses fixed the value of the timber cut at from $3.50 to $5 per thousand, and defendant's witnesses estimated its value at from $1 to $2 per thousand. *Held* that, the difference in the estimates not being explainable on the theory of a mere difference in judgment, a finding fixing the value at $4 per thousand would not be disturbed.
4. Because of his superior advantages for accurately weighing evidence and discovering the truth, the conclusions of the trial judge on questions of fact should not be disturbed on appeal unless manifestly wrong.
5. The term "price," used by witnesses testifying in respect to timber unlawfully cut, is *held* to have been used in the sense of "market value."

APPEAL from a judgment of the circuit court for Lincoln county: W. C. SILVERTHORN, Circuit Judge. *Affirmed.*

Action to recover damages for trespass upon real estate. The cause was tried by the court. The findings of fact on disputed questions are substantially as follows: In the months of January and February, 1894, defendants cut and removed from plaintiff's lands 371,440 feet, board measure, of pine timber, of the full value of $1,485.76. Such cutting and removal of the timber were by mistake of title, defendants honestly believing that such title was in the defendant *David K. Jeffris.* In the winter of 1894–95, defendants wilfully cut and removed from plaintiff's land tamarack, hemlock, birch, basswood, and cedar timber, and converted the same into manufactured products, which, while in the possession of defendants, were of the value of $886.49. All of such cutting and removal of timber from plaintiff's lands was without his permission.

For the appellants there was a brief by *Flett & Porter,* and oral argument by *W. H. Flett.*

For the respondent there was a brief by *Curtis, Reid, Smith & Curtis,* and oral argument by *F. J. Smith.*

MARSHALL, J. Three questions are presented for consideration on this appeal: (1) Is the finding as to the amount of pine timber cut from plaintiff's land excessive? (2) Is the finding as to the value of such timber excessive? (3) Is the finding that defendants cut from the lands timber other than pine timber supported by the evidence? All are questions of fact, and under the settled rule they must remain as determined by the trial court unless the evidence presented by the record shows that such determination is contrary to the clear preponderance of the evidence.

On the question of the amount of pine timber there is evidence of three estimates, made after the timber was cut and removed, by persons competent to do such work, two

of such estimates being considerably in excess of the amount of the trespass as found by the court. There is evidence that the estimates were made on the basis of a full scale and that some deductions therefrom were necessary in order to arrive at a proper amount for the application of the market value of the timber standing, and so obtain the true measure of plaintiff's damages. There is considerable evidence that some deductions were made from the full scale, and all that were necessary considering the character of the timber. There is evidence that a trespass other than that committed by defendants was included in the estimates, and conflicting evidence as to the amount thereof; also evidence that some of such additional trespass was on territory not covered by the estimates. Looking at all such evidence, the finding was made fixing the trespass for which defendants are liable at about 22,000 feet less than the highest amount testified to by any of the estimators, and about 17,000 feet less than the estimate made by another witness. The most unsatisfactory thing about it is that no deduction, to speak of, was made, to allow for the difference beween a full and a sound and merchantable scale; but the difficulty in that regard disappears when one reflects that the necessity for such deduction, though well known to those who have had much to do with such business, is not a matter of common knowledge. The trial court could not take judicial notice of the fact that the merchantable scale of pine timber, even of the superior character which some of the witnesses testified the timber in question was, is considerably less than the full scale thereof. The fact in that regard called for evidence, and on the evidence produced we cannot say the decision is contrary to the clear weight thereof, however much knowledge not possessed by persons generally may satisfy us that the fact is otherwise. The difficulty is not with the finding, but with the evidence. The evidence on the part of respondent is all one way, to the effect that the timber was

practically all sound, and that no deduction from a full scale was necessary to arrive at the merchantable scale. Two experienced woodmen testified to that, while one testified on the part of the appellants that a deduction from the full scale, of fifteen per cent., was necessary to arrive at the correct amount of lumber the timber would produce. The preponderance of the evidence, as we find it in the record, singular as it may seem to a person of experience in the measurement of logs by the scale rule, is to the effect that the timber in question would stand a full scale without injustice to a purchaser thereof buying the same on the basis of the amount of lumber that could be made from the same.

On the question of the value of the standing timber, two witnesses fixed the amount at $4 to $5 per thousand feet, board measure, one at $4, two at $3.50 to $4, and one at $3. One of the defendants put the value at $1.25 to $1.50 per thousand, and said that he purchased similar timber on that basis in 1896, and in 1895 was offered similar timber by defendant *D. K. Jeffris* for $2 per thousand. Another witness fixed the value of the timber at $1 per thousand, two others at $1.50 to $1.75, and still another at $2.

Counsel for appellants criticise the testimony of some of the witnesses who put the value of the timber at $4 per thousand feet and upwards, in that they did not testify to market value, the legal measure of damages. The claim of counsel in that regard is considered hypercritical. The witnesses used the term "price" instead of the term "market value," but it is perfectly evident they referred to what the timber would have sold for in the market at the time of the trespass, that is, to the market value of the timber.

True, there is some reason for saying that the evidence contained in the record preponderates in favor of a somewhat lower value for the timber than that fixed by the trial court, but there is no such clear and decided preponderance of the evidence that way as is necessary to justify this court

in saying that the trial court did not weigh the evidence properly and come to a correct conclusion. As has often been said, the opportunity which the trial judge possesses for accurately weighing evidence is so superior to that possessed by an appellate court that his conclusions on questions of fact must necessarily be given sufficient consideration to preclude their being disturbed by a subsequent judicial examination of the record of the trial on appeal, unless such conclusions appear thereby so manifestly wrong as not to be accounted for by the advantages for discovering the truth that cannot be carried into the written history of the trial and presented to the reviewing court. It is easy to understand how the trial judge, who observes a witness while testifying, may in some cases come to the conclusion that his testimony is false and reject it entirely, and base such conclusion upon an adequate cause, though such cause do not appear upon the record. The testimony of a witness may appear fair in the written history of a trial, yet be given in such a way as to clearly evidence to the trial judge that it is not entitled to much if any weight in the case. Here we have evidence that the timber was worth $1 per thousand feet in the market, and also evidence that it was worth $4 to $4.50 per thousand feet. Such a difference in price is not explainable upon the theory of a mere difference in judgment. The evidence upon the one side or the other was manifestly false. The trial court came to that conclusion and gave no credit to the evidence as to the very low valuation of the timber indicated. He was no doubt greatly aided in reaching that conclusion by the manner of the witnesses on the stand and by other unrecordable aids to eliciting the truth.

We will not take time to discuss the third assignment of error mentioned, by referring at length to the evidence. There is no need for incumbering the opinion by a discussion of the evidence in such a case. Suffice it to say that all

the evidence has been read and studied with care, and that no clear preponderance thereof against the decision of the trial court, as to any of the findings of fact challenged by appellants, has been discovered.

By the Court.—The judgment of the circuit court is affirmed.

CASSODAY, C. J., took no part.

EVISON, Appellant, vs. HALLOCK and another, imp., Respondents.

October 15 — December 7, 1900.

Sale of land by guardian: Failure to pay mortgage: Liability of surety on bond: Subrogation.

Plaintiff purchased, at a guardian's sale, land upon which there was a past-due mortgage for which the estate of the ward was liable, but which was not mentioned either in the petition or order for sale. The sale was confirmed and the guardian directed to make a good, valid, and sufficient deed. He made the usual guardian's deed to plaintiff, without warranties, but agreed to pay the mortgage and have it discharged. He failed to do this, and embezzled the money received on the sale, and died insolvent. Thereafter plaintiff, who had conveyed the land by warranty deed, learned that the mortgage had not been paid, and paid it himself. Pursuant to the order authorizing the sale the guardian had given bond conditioned for the faithful performance of the trust, for paying over, investing, or accounting for all moneys received by him according to the order of any court having authority to give direction in the premises, etc. The statute (sec. 3515, R. S. 1878) provided that the court should make an order for the application and disposition of the proceeds of the sale, etc.; but no such order was made. In an action against the sureties on the guardian's bond, it is *held* that as against them there was no liability either to the ward or to the mortgagee resulting from the guardian's failure to pay the mortgage, and hence the plaintiff had acquired no right against them by subrogation. The agreement by the guardian to pay the mortgage, not having been authorized by the court, was his individual contract and not an official act.

APPEAL from an order of the circuit court for Dodge county: JAMES J. DICK, Circuit Judge. *Affirmed.*

This is an action in equity, brought by the plaintiff against one D. H. Bement, an insane person, and the defendants *Hallock* and *Nehls*, who were sureties upon a bond given by one Rambusch, the general guardian of said Bement, upon the sale of the real estate of his ward. The facts set forth in the complaint are sufficiently stated in the opinion. The defendants *Hallock* and *Nehls* demurred to the complaint upon three grounds: (1) That there is a defect as to parties defendant; (2) that several causes of action have been improperly united; and (3) that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was sustained, and from an order sustaining the same the plaintiff appeals.

For the appellant there was a brief by *Sawyer & Sawyer*, and oral argument by *E. W. Sawyer.*

For the respondents the cause was submitted on the brief of *C. E. Hooker.*

The following opinion was filed October 30, 1900:

WINSLOW, J. The facts stated in the complaint are, in substance, as follows: In 1891 the general guardian of one Bement, an insane person, obtained authority from the circuit court, under the provisions of the statutes, to sell his ward's real estate, upon which there existed a past-due mortgage of $500, for which the estate of the ward was liable. No mention was made of the mortgage either in the petition of the guardian or in the order of sale. The order required a bond in the sum of $6,000, with sureties, conditioned for the faithful performance of the trust, for paying over, investing, or accounting for all the moneys received by the guardian according to the order of any court having authority to give direction in the premises, and for the observance of the directions of the court in relation to said

trust. The bond was given and signed by the defendants *Hallock* and *Nehls* as sureties, and approved by the court. The guardian then made a written contract with one Vesper for the sale of the real estate for $5,000 in cash, and reported the same to the court. The court confirmed the sale, and directed the guardian to make a good, valid, and sufficient deed of the lands to the purchaser on payment of the agreed price. Vesper, for value, assigned his rights to the plaintiff, who thereafter paid the guardian the agreed price of $5,000 for the lands and for a clear title thereto, and the guardian made the usual guardian's deed of the land to the plaintiff without warranties. The guardian received said $5,000 in full consideration for the lands and for a clear title to the same, and agreed to pay the mortgage and have it discharged, but failed to do so, and, on the other hand, converted and embezzled the money, with other moneys of the ward, and died insolvent in October, 1896. The plaintiff, soon after his purchase in 1891, conveyed the premises by warranty deed, and first learned that the mortgage was not paid in December, 1896, and in January, 1897, paid the mortgage debt, with interest, to the holder thereof, in order to make good the warranties in his deed, and caused the same to be discharged.

Upon these facts the plaintiff claims judgment against the sureties upon the bond for the amount paid to discharge the mortgage, upon the theory that he is entitled to be subrogated to the rights of the insane person or of the owner of the mortgage against said sureties.

The equitable right of subrogation arises under various conditions, but the fundamental principles which govern it are always the same. Briefly, it may be said to be that equitable right by which one person who has paid a debt for which he is only secondarily liable is entitled to succeed to and utilize the securities and remedies possessed by the original creditor. Bispham, Eq. § 335. Manifestly, the right

of the person subrogated is measured by the right of the original creditor, and cannot be extended further. *Franklin S. Bank v. Taylor*, 131 Ill. 376. Conceding that plaintiff, on account of his warranty of title, was secondarily liable to pay the mortgage debt on the land, the vital question is whether either Bement, the insane person, or the holder of the mortgage became a creditor of Rambusch and his sureties on the bond when Rambusch failed to pay the mortgage, and could bring action for such failure. If this question must be answered in the negative, then there can be no subrogation, because there is no original creditor to whose rights the plaintiff can be subrogated. It seems plain that as against the respondents, who were simply sureties on the guardian's bond, there was no liability, either to Bement or to the mortgagee, resulting from the guardian's failure to pay off the mortgage. Their liability was that of sureties only, and limited to the stipulations of the bond. Those stipulations were, in substance, that the guardian should faithfully perform his trust, and pay over, invest, or account for the moneys received by him according to the directions of any court having authority to direct in the matter. No court has at any time directed or authorized the guardian to pay off this mortgage; hence the failure to pay it was not the breach of any duty, and consequently not the foundation of any right of recovery by either the ward or the mortgagee.

The statute upon this subject (R. S. 1878, sec. 3515) provided that the court or judge should make an order for the application and disposition of the proceeds of such sale and of the income derived from the investment thereof, etc. No such order was here made, and the guardian could not be charged with breach of duty until such an order was made and not complied with.

It may be that under the circumstances here alleged the court would have been authorized to incorporate in the original order granting leave to sell a provision that the

guardian sell free of incumbrances and at once discharge the mortgage (it appearing that the mortgage was past due and could be paid at any time); but it is sufficient to say that no such order is alleged to have been made, either before or after the sale. The plaintiff's cause of action must be founded upon a breach of duty by the guardian in not paying off the mortgage; but, as we have seen, there had no such duty arisen, hence there was no breach, and consequently no liability on the bond.

If, as alleged in the complaint, the guardian himself agreed with the plaintiff to pay the mortgage, this was plainly his own individual contract, and not an official act, for the court had neither expressly nor impliedly authorized him to make such an agreement.

This view of the case renders the discussion of any other questions unnecessary.

By the Court.— Order affirmed.

On a motion for rehearing appellant contended, *inter alia*, that, taking the allegations of fact in the complaint as true, it was the guardian's duty, within a reasonable time after the sale, to apply for the necessary order and pay this debt against his ward, and a failure to do so was a breach of his bond for which he and his sureties are liable. *Bartlett v. Hunt*, 17 Wis. 216; *State v. Mills*, 55 Wis. 229; *Joint School Dist. v. Lyford*, 27 Wis. 506; *State v. McFetridge*, 84 Wis. 531. And it being a part of his duty to apply for and get the necessary order, both he and the sureties upon his bond are estopped to urge that no order was made. To allow them to do so is to allow them to take advantage of their own neglect of duty. Even if there be no technical breach of the bond, the sureties will not, because of the mere absence of such order, be relieved from liability by a court of equity. If they were entitled to have a formal order entered before suit, still, this being an action in equity in the

same court, where the court can protect the rights of all parties, the failure to get the order *before* suit would only affect the question of costs. *O'Dell v. Burnham*, 61 Wis. 562. There is no occasion for a multiplicity of suits in the matter.

The motion was denied December 7, 1900.

RYAN, Administrator, Respondent, vs. PHILIPPI, imp., Appellant.

108	254
114	275
114	530
108	254
116	500

October 15 — December 7, 1900.

Appeal from order: Defective return: Dismissal.

Where an order of the circuit court does not (as required by Circuit Court Rule XI, sec. 6) refer to the papers on which it was based, and the clerk's certificate to the return on an appeal therefrom does not show that he has sent to this court the papers used on the motion, the appeal must be dismissed.

APPEAL from an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Appeal dismissed.*

Appeal from an order refusing to set aside a judgment as to appellant, the judgment having been rendered against him and two other persons as partners. The order appealed from does not refer to the papers on which it was based, nor the returns of the clerk to this court show the papers upon which the motion was heard. The returns are three in number. The ones that contain papers relied upon to show want of jurisdiction to enter the judgment are simply to the effect that they contain all the original papers on file in the action.

For the appellant there were briefs by *Frame & Blackstone*, and oral argument by *A. L. Blackstone*.

For the respondent there was a brief by *Ryan & Merton*, and oral argument by *E. Merton*.

The following opinion was filed October 30, 1900:

MARSHALL, J. The appeal must be dismissed. Sec. 3050, Stats. 1898, requires the return, on appeal from an order, to contain the order appealed from and the original papers, or copies thereof, used by either party on the application therefor; and sec. 6, rule XI, of the circuit court rules, requires an order to refer to all records and papers used or read by either party upon the application therefor. The last requisite was not complied with, but that is not jurisdictional if it was not for the fact that the clerk's certificate does not show that he has sent to this court the papers used upon the motion. The papers sent up being affected by both infirmities mentioned, it is impossible to tell what the order appealed from is based upon. That is jurisdictional,—so decided in *Glover v. Wells & Mulrooney G. Co.* 93 Wis. 13; *Hoffman & Billings Mfg. Co. v. Burdick*, 95 Wis. 342; *Tenney v. Madison*, 99 Wis. 539; *Superior C. L. Co. v. Superior*, 104 Wis. 463.

By the Court.—The appeal is dismissed.

A motion for a rehearing was denied December 7, 1900.

WILLS, Administrator, Respondent, vs. ASHLAND LIGHT, POWER & STREET RAILWAY COMPANY, Appellant.

108 255
108 592

108 255
109 74

108 255
110 *416

108 255
112 4 59

October 31—December 7, 1900.

Street railways: Negligence: Injury to boy on track: Contributory negligence: Proximate cause: Special verdict: Instructions to jury.

1. In an action to recover damages for the death of a boy about fourteen years old who, while on the track of a street railway, was struck by a car, it was error to submit in a special verdict a question as to whether the boy was of sufficient age, capacity, and ex-

perience to understand the danger and risk of going upon the track without looking and listening, "to the same extent as an ordinary adult person." That was not an issuable fact.

2. It was error in such case to submit the question of contributory negligence in such a way as to call upon the jury to determine whether the boy was using "such care and attention as an ordinary and careful person of the same age, understanding, and experience *should* have used," instead of such care as ordinarily careful persons of similar age and experience do use or would use under like circumstances.

3. To establish liability for an injury on the ground of negligence a special verdict, besides finding the particular things in which the defendant was negligent, should also find that such negligence was the proximate cause of the injury.

4. The submission of a question as to whether the defendant was "guilty of such want of ordinary care as to be the direct or proximate cause of the injury," together with instructions to the effect that the words "direct" and "proximate" mean about the same thing, was error.

5. A general verdict should not be submitted in connection with a special verdict.

6. A boy nearly fourteen years old was struck and killed by a car on the track of an electric street railway. From the trestle of a railroad which crossed above the street railway he had walked in the street diagonally toward the track and then by the side of it for a short distance as the car slowly approached from behind, and then, with his head turned away from the track, looking at a train which was passing on the trestle, he moved partially sidewise nearer and nearer to the track until the car was within a few feet, when, apparently hearing a shout from the motorman, he suddenly stepped sidewise upon the track just in front of the car. Upon the evidence (more fully stated in the opinions) it is *held:*

(1) The injury was not intentional on the part of the motorman, nor was his conduct so reckless and wanton as to evince a total disregard of the boy's safety.

(2) The boy was guilty of contributory negligence as a matter of law. DODGE and WINSLOW, JJ., dissenting as to the last point, are of the opinion that its decision is unnecessary, and also that upon the evidence the question of contributory negligence was one for the jury.

APPEAL from a judgment of the circuit court for Ashland county: W. C. SILVERTHORN, Judge. *Reversed.*

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

A. Kanneberg, for the respondent.

CASSODAY, C. J. This is an action to recover damages for the death of plaintiff's intestate and son, Michael, caused by being struck by the defendant's moving car, about 4 o'clock in the afternoon of May 16, 1898. Issue being joined and trial had, the jury returned a special verdict to the effect (1) that the boy killed by the accident was not of sufficient age, capacity, and experience to understand the danger and risk of going upon the railway track without looking and listening, at the time, place, and under the circumstances, to the same extent as an ordinary adult person; (2) that the boy at the time of the accident was using such care and attention as an ordinary and careful person of the same age, understanding, and experience should have used; (3) that, taking into consideration his age, understanding, and experience, he was not guilty of such want of ordinary care which contributed to the injuries he received; (4) that the motorman, in the exercise of ordinary care, should have sounded his gong on the car after seeing the boy going toward the track; (5) that the motorman could have stopped the car, after seeing the boy dangerously near to or about to step upon the track, in time to prevent the accident; (6) that the motorman, in the management of his car, did not use ordinary care in the use of the brake, bell, reverser, and other appliances, after seeing the boy going toward the track; (7) that the defendant's servant or servants was or were guilty of such want of ordinary care as to be the direct or proximate cause of the injury; (8) that they found for the plaintiff; (9) and assessed his damages at $3,700. From the judgment entered upon that verdict for the amount stated, with costs, the defendant brings this appeal.

The place of the accident was on a bridge where Second

street, in the city of Ashland, runs over a ravine in an easterly and westerly direction. About 250 feet west of the place of injury, Second street descends toward the east quite rapidly for a distance of about 125 feet, to a point where that street is crossed by an elevated railroad bridge, over which ore trains pass northward to the Ashland docks. From the point in Second street so crossed by the elevated railroad bridge Second street ascends gently toward the east up the approach to the bridge in Second street over the ravine, at a grade of about three feet in one hundred feet.

On the day in question the deceased came by a path down under the railroad trestle on the east side of the railroad bridge, and on the north side of Second street, and entered that street about where the approach to the bridge over the ravine in that street commenced. He walked along eastward for about seventy-five feet in the space between the single car track in the middle of Second street and the sidewalk on the north side thereof, at a distance of five or six feet from the track. While he was so walking a heavy ore train was passing over the elevated railroad bridge, and, according to certain witnesses on the part of the plaintiff, the deceased was apparently watching that train, with his head turned over his shoulder. In the meantime the defendant's car in question came eastward on Second street, down the decline west of the railroad bridge, the brakes being thrown off as it approached that bridge, and it ran by its own momentum, the current being turned off, up the grade, onto the bridge, at from four to six miles per hour. The progress of the deceased at first was nearly parallel to the street railway track, but after a little he turned towards it so that, as the car approached within eight or ten feet of him,—and some of the witnesses say less,—he was near enough to be in danger of being struck. At that moment a man one hundred feet away in the street shouted to him, and apparently about the same time the motorman running the car also shouted

to him. The deceased was at that moment looking over his left shoulder away from the street railroad track, and stepped sideways or backwards right onto the track, almost in front of the moving car, and was struck by it and run over and killed.

The car was being operated at the moment by a man who had been practicing for a few days and was then under the care and direction of the regular motorman, the latter being seated or standing within and near the front end of the car. The motorman testifies that he sounded his gong as he passed under the railroad bridge, but that when he saw that the boy was in peril he forgot to sound his gong again, it being more natural for him to shout; that at the moment of shouting the boy was four or five feet away, and he applied the brakes, but did not reverse his electric current; that he never had stopped or tried to stop a car by reversing, but understood using the reverse lever; that he had never run the car alone; that one could operate those different levers and handles, and at the same time look ahead of his car outside, but that when one was new at the business it was a little awkward; that as soon as he had got to using both hands there was no trouble, and it was easier. There is conflict in the evidence as to the relative efficiency of reversing the current and applying the brake; some witnesses testifying that the former was more efficient and ought to be used in case of emergency. But a rule of the company, in evidence, is as follows: "Before reversing the motor the current should always be cut off and the brakes applied, bringing the car to a dead stop. This rule must be observed always, *except in cases of extreme danger*. Should the brakes fail to work on down grade, or other imminent danger to life be apparent, the car can easily be handled by the reversing switch, if the motorman exercises proper judgment. . . . It requires but very small movement of the controller handle to obtain sufficient power to reverse the wheels, and any

further movement would be of more danger than benefit. As soon as the car stops, break the current in the usual manner. This method of stopping must not be resorted to except in cases of extreme danger."

There are several grounds upon which the judgment in this case must be reversed. The first question submitted did not call for the determination of an issuable fact. The age, capacity, and experience of the boy were matters of evidence, and really undisputed. He was nearly fourteen years of age, and was a bright, intelligent, and well-grown boy. He had been brought up on a farm about fifteen miles from Ashland, and was accustomed to attend school in the winter, and was able to do much of a man's work on the farm, and had been in Ashland with his father three or four times a year. Whether he understood the danger and risk of going upon the railway track without looking or listening, "to *the same extent* as an ordinary adult person," was not an issuable fact.

The second question called upon the jury to determine whether the boy at the time was "using such care and attention as an ordinary and careful person of the same age, understanding, and experience *should have used.*" The wording of the question left it for the jury to fix the standard of care according to their own notions, instead of determining what care ordinarily careful persons of similar age and experience do use or would use. The charge of the court on that question was well calculated to confuse the jury. If we understand it correctly, it is to the effect that it was submitted in connection with the first question, for the reason that, if they should find in answer to that question "that by reason of his want of age and experience he was fully unable to fully comprehend the danger," and "was so confused and distracted as not . . . to look and listen," although they might answer the first question in the negative, "yet, if he was able . . . to comprehend this dan-

ger," then they could determine the fact by answering that question. By the third question the jury were required to determine whether the boy was "guilty of such want of ordinary care" as was thus mentioned in the second question. The result is that the question whether the deceased was guilty of contributory negligence was not submitted to the jury — certainly not properly submitted.

Assuming that the answers of the jury to questions 4, 5, and 6, submitted, properly determined that the motorman was negligent in failing to sound the gong after he saw the boy going toward the track, or to stop the car after he saw the boy dangerously near the track, or in the use of the brake, bell, reverser, and other appliances after seeing the boy go toward the track, yet there is no appropriate finding that such negligence was the proximate cause of the injury.

In answer to the seventh question submitted, the jury found that the defendant's servant or servants was or were "guilty of such want of ordinary care as to be the *direct or proximate* cause of the injury." In charging the jury upon that question the court said: "Those words 'direct' and 'proximate' mean about the same thing; mean the cause which naturally produced the accident, caused the accident; and you are to decide whether the servants — that is, the motorman himself or the man along with him on the same car, or both — were guilty of such want of ordinary care as caused — naturally and probably caused — the accident, in answering that question." The first part of this statement is certainly erroneous. The words "direct" and "proximate" do not "mean about the same thing." The direct cause may not be the proximate cause, and the proximate cause may not be the direct cause. Neither time nor distance is essentially a controlling element in determining whether a certain cause of an injury is the proximate cause of such injury. The distinction is stated in numerous cases in this

court, and requires no repetition. We cite only a few of the more recent. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 284–288; *McFarlane v. Sullivan*, 99 Wis. 363, 364; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 388; *Ward v. C., M. & St. P. R. Co.* 102 Wis. 219, 220; *Bigelow v. Danielson*, 102 Wis. 474; *Baxter v. C. & N. W. R. Co.* 104 Wis. 317–319.

In this case the court submitted a general verdict in connection with the special verdict. Although the objection does not appear to be preserved in the record, yet, to prevent a repetition, we call attention to the recent cases in this court condemning such practice: *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215; *Crouse v. C. & N. W. R. Co.* 102 Wis. 210; *Schaidler v. C. & N. W. R. Co.* 102 Wis. 571.

Error is assigned because the court refused to grant a nonsuit or to direct a verdict in favor of the defendant. It appears that the car moved slowly as it came down the decline on the west side of the elevated railroad bridge; that when it got to the lowest point in Second street it started up more rapidly, but as it passed up the approach to the bridge in Second street over the ravine it slowed up, and was going slow when it struck the boy. The motorman testified to the effect that he sounded the gong when under the elevated railroad bridge, which was about 125 feet west from where the car struck the boy; that the boy was walking a medium walk, east, the same way the car was going, and nearing the track all the time; that he did not slacken up for the boy, because the car was going slow,— three or four miles an hour,—and he had not turned on the current; that the boy came onto the track kind of sideways, with his back to the car; that he was about four or five feet from the car when he stepped on the track; that he thought at first that the boy was coming to get on the car; that when he saw the boy was getting too close to the car, he halloed "Look out" to him, and set the brake, and the boy then stepped onto the track; that when the brake took effect the

boy was not two feet from the car; that when he first saw the boy he was about twenty feet ahead of the car and about five or six feet from the north rail of the track; that he practiced a week previously, and some a year before, but had never run a car alone; that the current was not turned on when the car struck the boy; that from the place where he let the brake off to the place where he struck the boy was about seventy-five or one hundred feet.

The plaintiff's witness Betker testified to the effect that he saw the accident, and was six or seven rods from where it occurred; that the boy walked for two or three rods about three or four feet from the track, and then walked sideways on the track ten or fifteen feet, watching the ore train over his left shoulder; that his own attention was called to the ore train, and he first noticed the boy when he started to go sideways onto the track. The plaintiff's witness Hyland testified to the effect that his attention was called to the boy by hearing the alarm given by the witness Cain; that when the boy first stepped onto the track the car was only three or four feet from him; that the boy was then kind of backing up toward the car. The plaintiff's witness Cain testified to the effect that he was walking with the witness Hyland when he saw the boy killed; that he was then about 150 feet from him; that the boy walked from under the ore-dock trestle across over the sidewalk, and diagonally toward the street-car track, until he got within three or four feet of it, and then along by the side of it, and from two to two and one-half feet from it, until he gave the alarm; that the boy walked along the side of the track in that way ten or fifteen feet before he stepped upon the track; that the boy stepped upon the track just as he "hollered" to him, and the car was then five or six feet from the boy; that it appeared to him to be dangerous when the boy was fifteen or twenty feet from the car; that the boy was between seventy-five and eighty or ninety feet from the east end of the bridge when he was struck.

The evidence fails to show that the motorman intended to injure the boy, or that his conduct was so reckless or wanton as to evince a total disregard of the boy's safety, as defined in a case decided herewith. *Schug v. C., M. & St. P. R. Co.* 102 Wis. 523, and cases cited; *Ryan v. La Crosse City R. Co., ante*, p. 122; *Bolin v. C., St. P., M. & O. R. Co., post*, p. 333. Nevertheless, the evidence is ample to show actionable negligence on the part of the defendant.

The important question in the case is whether the deceased was not also guilty of contributory negligence. According to the undisputed evidence, he walked from under the trestle down over the sidewalk into the street until he got within from three to six feet of the track, and then, with his head turned toward his left shoulder, looking at the passing ore train, he moved partially sideways, nearer and nearer to the track, until within a few feet of the car, when apparently he heard the alarm and suddenly stepped sideways onto the track, just a few feet in front of the car, and was struck and killed. The law required that he should look in both directions for a street car before going upon the track. *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 385, 386, and cases there cited; *Cawley v. La Crosse City R. Co.* 101 Wis. 152; *White v. C. & N. W. R. Co.* 102 Wis. 489. The only excuses given are his youth, and the fact that he lived in the country and was not familiar with the movement of street-railway cars, and that his attention was at the time diverted to the ore train. He lacked two months of being fourteen years of age. He was bound to know and comprehend all the dangers which were open and obvious to a boy of ordinary understanding of his age and experience. He had frequently been in the city. If there is anything a country boy of his age would be likely to observe, it would be a street car moved by electricity. To see it move would be to know that it would be dangerous to get upon the track in front of it. It was in the middle of May, and the track

was open to observation. His attention was not forced to the ore train, nor necessarily diverted, as in some cases in this court. *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 386, and cases there cited. The ore train had no necessary connection with his movements. There was nothing to obstruct his vision. There was nothing in the time of day or the weather to prevent observation. His looking at the ore train was no more excusable than it would have been to look at the sun or a passing cloud. There was nothing complicated in the situation, calling for deliberation and judgment. It was simply a failure to use his senses at a time when the law required him to do so. The law applicable to the facts has been so often and so recently stated as not to require repetition. *Helmke v. Thilmany*, 107 Wis. 216; *Ryan v. La Crosse City R. Co.*, *ante*, p. 122, and cases there cited. After careful consideration, and upon the undisputed evidence, we must hold that the deceased was guilty of contributory negligence.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

DODGE, J. With considerable reluctance, but unavoidably, I feel it my duty to limit my concurrence in the reversal of the judgment in this case to certain of the grounds stated in the opinion of the court. I have no doubt of the insufficiency of the special verdict, nor of the existence of prejudicial error in the charge to the jury, and fully agree with reversal predicated thereon. I, however, deprecate and feel constrained to express my disagreement with that portion of the opinion which declares, as matter of law, that the conduct of the deceased boy constitutes negligence *per se*. I deprecate it because it seems to me unnecessary. A reversal and new trial must be ordered for the specific errors, and on such new trial the evidence is more than likely to present this question in a different light. Facts now absent

may well be proved to render probable or improbable knowledge by the deceased of the existence of the street-railway track in question. His familiarity, or the reverse, with that locality, the construction of the track and street, the obscurement of the former by dust or débris, and numerous other circumstances may so vary the situation that an opinion based upon the present record can hardly aid the trial court. RYAN, C. J., in *Wells v. Perkins*, 43 Wis. 160, 166.

Further, I cannot avoid the conviction that there was ample room for reasonable and honest minds to differ upon the question whether the conduct of this boy was more careless than the conduct ordinarily to be expected of the great mass of boys of his age, intelligence, and knowledge of existing perils. Nay, I incline to the conclusion reached by the twelve citizens of Ashland county comprising the jury who, in the light of their experience and observation, declared it not so negligent. I yield, of course, to the case of *Ryan v. La Crosse City R. Co.*, *ante*, p. 122, as now the law. It is possible for a child younger than plaintiff's intestate to be guilty of negligence so obvious that the court must declare it, and conduct such as was presented and passed on in that case is such negligence. Nevertheless the rule so often stated in the cases collected in the opinion of the court and in my dissent in the *Ryan Case* remains,—that, except in extreme cases, the conduct of a child of this age should be tested by the combined experience of twelve jurymen before it should be held variant from the care ordinarily exercised by such children.

Doubtless this boy was of age and intelligence sufficient to appreciate the danger of getting in front of a rapidly moving street car, but the evidence in this case is quite conclusive that he had no knowledge in fact of the approach of this car, and that such ignorance was consistent with ordinary diligence in exercising at least his sense of hearing; for the rattle and roar of the ore train passing over the timber trestle above him

is described as sufficient to drown all ordinary sounds. The sound of the gong, which might have penetrated that clamor and warned him, was negligently omitted by the motorman.

It is true, deceased did not look to the west for an approaching car, and such is apparently the negligence ascribed to him. Not yet, however, has it been held that it is the duty of the ordinarily careful person to look for a car when he has no knowledge that he is approaching a track; and the case in hand is absolutely barren of any evidence that deceased knew there was any track in that street, or that there was anything about its construction to force that fact on his attention. On the contrary, it does appear that the street was paved with cedar blocks, excluding the probability that the track was higher than the rest of the driveway; that it was May, when the winter's accumulation of the débris of a lumber town would obscure the street; that it was dusty; and that this was at the eastern extremity of the main city, where the street-railway service was performed by a single car. He was a country boy, only infrequently in the city. He was in a peculiarly confused place in the road, just emerging from the shadows of a double and complicated railroad bridge onto the street, where there was no sidewalk, and where the ordinary paved way was much used by foot passengers; and his attention was unquestionably attracted by the novel and interesting sight of an ore train making its way over the trestle out to the ore dock,— evidently a subject of interest, for nearly all of the witnesses who were in the vicinity testify that their attention also was attracted thereby and diverted from their respective affairs. Can it be said that deceased might not, with his attention thus engrossed to his left, have clambered from the side of the railroad grade, and from among the trestle timbers, into and along this street, for 100 feet, without noticing the presence of the strips of iron a few feet to his right, consistently with the care ordinarily

exercised by such boys? If my personal observation and experience may serve to guide my judgment, such conduct is not inconsistent with what is customary. The attention of the ordinary farmer's boy, visiting the city three or four times a year, is not, as a rule, riveted to the ground on which he steps, in search of street-car tracks. The novel and interesting sights and events are ordinarily the subject of his attention. His chin is on his shoulder oftener than his eyes are on the ground. To ignore such custom, and set up different conduct as the standard of due care, is to adopt the very error embodied in the second and third questions of the special verdict, and held ground for reversal in this case. It is to substitute an ideal of the imagination in place of the care which experience informs us is ordinarily exercised, as a standard for measuring the care of those who may be injured by negligence of the operators of street railways.

WINSLOW, J. I concur in the foregoing opinion of Mr. Justice DODGE.

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108 268
116 569

MARSHFIELD LAND & LUMBER COMPANY, Appellant, vs. THE JOHN WEEK LUMBER COMPANY (LIMITED), Respondent.

November 16 — December 7, 1900.

Injunctional order: Vacating: Notice: Suspending business of corporation: Highway by user: Logging roads: Custom: License to use: Malicious revocation.

1. Under secs. 2781 and 2814, Stats. 1898, the court cannot, except upon notice, vacate an injunctional order granted without notice by a court commissioner upon a complaint stating facts sufficient to give him a colorable right to make the order, even though such facts are not sufficient to warrant the interference of equity in plaintiff's behalf.

2. An order restraining a lumbering corporation, a part of whose business was the handling of logs, from continued trespasses in building roads and hauling logs over lands owned by plaintiff, is not within the meaning of sec. 2780, Stats. 1898, which prohibits a court commissioner from granting an injunction "to suspend the general and ordinary business of a corporation."
3. More than twenty years before the commencement of an action to restrain trespasses a logging road had been made at the place in question, which had been used at times in later years by persons logging in that neighborhood, and at times some settlers had hauled a few loads of hay over it. After nonuse for a number of years it had grown up to brush and was incumbered by windfalls. The town had never adopted it as a highway or done any work on it. *Held*, that the road had not become a highway by prescriptive use.
4. A custom in logging sections for loggers to use old roads over private lands, and to make repairs necessary to such use, does not give the right to use such a road against the consent of the owner. Any implied license of use would be revocable at any time, even if the revocation were prompted by malice or ill will.

APPEAL from orders of the circuit court for Taylor county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This action was commenced February 21, 1900, to restrain the defendant from entering upon, cutting timber from, crossing over, hauling or banking logs on, or using or injuring, certain premises of the plaintiff. The complaint sets out that the defendant, without its consent, had theretofore entered upon certain premises of the plaintiff with a large number of men and teams, and had proceeded to remove and destroy timber, built logging roads, and had hauled over and banked thereon large quantities of saw-logs, and was continuing such trespasses, and causing irreparable injury thereto, for which plaintiff had no adequate remedy at law, and which it feared might ripen into an easement. Upon the complaint,duly verified, a court commissioner of Taylor county issued an order restraining the defendant, its officers, agents, and employees, from entering upon said premises, from hauling logs over the lands, from cutting any trees thereon, and from building or using any roads thereon, until the further order of the court.

The complaint and order were duly served. On February 23d, the defendant prepared an answer in which it is alleged that defendant's business was logging and lumbering; that it owned certain lands in the neighborhood of plaintiff's lands; that at the time it purchased said lands there was a public road or highway extending from Rib river across plaintiff's lands to a point on defendant's property, and thence to a public highway. Upon information and belief it is alleged that said road had first been used for travel more than twenty years ago, and had been used in hauling logs, hay, and supplies from the river by lumbermen and by the public generally; that commencing on December 1, 1899, the defendant had used said road in traveling back and forth from the river to its said lands, and had made some improvements thereon, blasting stumps and leveling knolls, and denied that it had cut any trees; that said road had been used and improved by those desiring to use it with consent of the owners for more than twenty years, and a prescriptive right to its use was claimed. It was also alleged that the acts complained of were a benefit to the property, and not an injury, and that plaintiff had an adequate remedy at law. The defendant set up the same facts as a counterclaim, with the further allegations that defendant had about 200,000 feet of logs yet to be hauled, and that there was no other way to get them out except over this road, and, if it was prevented from getting them out, they would be a complete loss; that defendant had thirty men and twelve teams doing nothing, and would be obliged to take them out of the woods unless they could put in said logs. There were also allegations that plaintiff was not acting in good faith, but was attempting to extort from defendant a large sum of money for the use of said road; that defendant had offered to give a bond to pay all damages, and was willing to pay for all injuries to said property.

Upon this answer, accompanied with several affidavits

setting out other facts not material to this litigation, the defendant, on February 23, 1900, obtained from the court an order to show cause, returnable at Ashland on March 2d, why an injunctional order should not be made, restraining the plaintiff from molesting the defendant or its employees in hauling logs over this road. The order also provided that in the meantime the plaintiff should be so restrained, and said order made by the court commissioner on February 21, 1900, at the request of plaintiff, was vacated and set aside. On March 6th the court made an order, based upon the answer, the affidavits used on the hearing, and upon the record, restraining the plaintiff, until the further order of the court, from obstructing said road or in any manner interfering with or molesting the defendant or its employees in the use thereof.

Upon this hearing a large number of affidavits were used, on the one side tending to show that the road in question was a mere private logging road, so overgrown with underbrush as to have been impassable by teams when the defendant entered upon the land; that it had only been used casually by an occasional logger for some little time after it had been first cut out, and not at all during later years; that the road had never been laid out or adopted in any way by the town authorities; that the defendant had made application to the town authorities to lay out a temporary logging road over the same route; and in the application therefor, duly verified, it was alleged that said road did not run along or near any highway. The affidavits in support of the application showed that the road had been used at different times by loggers in that neighborhood, and that occasionally a settler had hauled hay over it.

It further appears that pending the proceedings plaintiff obstructed the road by felling trees across it and by blowing holes in it with dynamite. Proceedings to punish for contempt were instituted, and a large number of affidavits used

on said hearing are contained in the record, and it is said were considered by the court in this matter. The most that can be said of them is that they show that there was a determined effort on the one side to prevent the use of the road by injuring and destroying portions of it, and on the other to repair and use it until the logs remaining in the woods had been hauled.

The plaintiff has appealed from the order of March 6, and from so much of the order of February 23, 1900, as vacated the order of the court commissioner first above mentioned.

For the appellant there was a brief by *Schweppe & Urquhart*, attorneys, and *Thompson, Harshaw & Thompson*, of counsel, and oral argument by *A. E. Thompson*.

For the respondent the cause was submitted on the brief of *Cate, Lamoreux & Park*.

BARDEEN, J. We will first consider the appeal from that portion of the order of February 23, 1900, which dissolved the injunction granted in plaintiff's favor by the court commissioner. This order was made by the court upon application of the defendant, and without notice to plaintiff. Sec. 2781, Stats. 1898, says: "If the injunction be granted by a judge without notice the other party, at any time before trial, may apply, *upon notice*, to the court, or to the presiding judge thereof, in which the action is brought to vacate or modify the same." Another section provides that, "An order made out of court, without notice, may be vacated or modified without notice by the judge who made it; or upon motion, after notice, by such judge or by the court, but not otherwise." Sec. 2814. In view of these plain statutory provisions, it is impossible to justify the action of the court above referred to. Sufficient facts were stated in the complaint to give the court commissioner at least a colorable right to make the order restraining the defendant from committing the repeated trespasses upon the plaintiff's land, as alleged. No matter

what the exigencies were, the court ought not to have vacated such order except upon notice. The suggestion by defendant's counsel that the order suspended "the general and ordinary business of a corporation" hardly merits sober consideration. The acts complained of were continued trespasses upon lands owned by plaintiff. It can hardly be said that such is "the general and ordinary business" of the defendant, although there are loggers in northern Wisconsin whose acts would seem to give some color to this assumption. The fact that the defendant was a lumbering corporation, and that a part of its business was the handling of logs, is not sufficient to bring the situation either within the letter or the spirit of sec. 2780, which prevents a court commissioner from issuing an injunction to suspend the general and ordinary business of a corporation. The other objections urged against the order are not deemed of sufficient importance to require notice.

The order of March 6th was based upon the counterclaim in defendant's answer and certain affidavits referred to in the statement. The remaining question is whether there was a sufficient showing made to authorize the court in restraining the plaintiff from obstructing the road or molesting the defendant in its use. When we come to consider all the facts that were before the court, the conclusion is certain that plaintiff was the owner of the premises in question; and, while there is an attempt in the answer to put that fact in issue, the subsequent allegations and the proof produced on the hearing are sufficient to set that matter at rest as stated. The only ground upon which the defendant sought to justify its use of the road was that it had become a highway by prescriptive use. An attempt to set out such use was made in the answer, but the affidavits used on the hearing overwhelmingly show that this contention was unfounded. The most that appears is that a logging road had been made there in the early 70's, which had been used at

different times in later years by persons logging in that neighborhood. At times some settlers had hauled a few loads of hay over it. After nonuse for a number of years it grew up to brush and was incumbered by windfalls. No pretense or claim was made that the town had ever adopted it as a highway or had ever done any work or expended any money upon it. Counsel for the defendant virtually admitted that their claim in this regard was without foundation. They then seek to justify the order of the court on the ground that it was customary in logging sections for loggers to use old roads, and to make such repairs as were necessary to that use. Undoubtedly that is the custom, and very few owners of land object to such use. But such custom does not justify such use when the owner of the property objects. The circumstances might be such that an implied license of use, good until revoked, might be inferred. Such license would be revocable at any time. In this case, if it ever existed, it had been revoked, and its revocation had been emphasized by the strong arm of the law. It can make no difference to defendant's right to an injunction that such revocation caused some hardship to it, or was prompted by some unneighborly feeling towards it. The owner was entitled to the free and exclusive use of its property and without restraint. Any infringement of this right by the court was unlawful, unless based upon some paramount right possessed by defendant or shared by it in common with the public. No such right or privilege was shown, and the order of the court was an unjustifiable invasion of the property interests of the plaintiff. As before suggested, it is no justification to say that it prevented an apparent injustice, or that the acts of plaintiff were indefensible from an ethical point of view. An injustice may often result from the enforcement of strict legal rights, or from acts committed with a malicious motive on one's own premises, or with regard to one's own property. Quite a notable instance may be found

in the recent case of *Metzger v. Hochrein*, 107 Wis. 267. The plaintiff had a clear legal right to the enjoyment of its property free from any interference by defendant, and the right to prevent such interference by an appeal to equity where the injury was irreparable.

An attack is made upon the complaint as not stating facts sufficient to warrant the interference of equity in plaintiff's behalf. On this question we express no opinion. If it be admitted that it is infirm in this regard, it adds nothing to the defendant's counterclaim, neither does it justify the court in an arbitrary dissolution of the injunction based upon it. The statute referred to provided a reasonable rule of practice which should have been followed.

Our conclusion is that that portion of the order of February 23, 1900, appealed from, should be reversed, and the order of March 6, 1900, should also be reversed.

By the Court.—The orders are reversed as stated in the opinion, and the cause is remanded for further proceedings according to law.

THE DEERING HARVESTER COMPANY, Respondent, vs. JOHNSON, Executor, Appellant.

November 16—December 7, 1900.

Appeal from county court: Granting leave after time has expired: Errors: Affidavit of merits: Abuse of discretion.

1. Error of the county court in admitting in evidence, in support of a claim against a decedent, notes purporting to have been signed by him, without proof of his signature, does not necessarily establish "that justice requires a revision of the case" and that an appeal from the allowance of the claim should be granted, under sec. 4035, Stats. 1898, after the time for appeal has expired.
2. In such a case the petition for leave to appeal was supported only by an affidavit of the *executor's attorney*, showing that the failure to perfect an appeal in due time was due to an excusable mistake,

and stating that *the executor* "believes that justice requires a revision of the case for the reason that there never was any consideration for said notes, and the estate" does not owe the debt, "as *said executor* is informed and believes," but not stating what information the executor had or any facts justifying his belief. It was not asserted that the notes were not duly executed by the deceased; and affidavits on behalf of the claimant were to the effect that they had been so executed. *Held*, that the denial of the petition was not an abuse of discretion.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

The plaintiff presented a verified claim against the estate of Peter C. Larson, deceased, consisting of three promissory notes, all dated July 31, 1896, the first for $45, and the others for $40 each, which were upon the printed form of the plaintiff corporation, and as presented were due on or before December, 1, 1897, December 1, 1898, and December 1, 1899. Each contained, in fine print, the clause, "with interest payable annually from date until paid," with the word "date" erased with a pen, and the words "August 1st, 1897," written above it. The signature on each note in ink appeared to be written over the same letters in pencil, and the year of maturity in each to have been written in similar ink over a previous smaller figure; that is to say, in the first note the figure "7" had been written over a figure "6," in the second a figure "8" over a figure "7," and in the third the figure "9" over a figure "8." No defense except a general objection to the allowance of the claim was offered in county court, and when the notes were offered in evidence they were objected to because they showed alteration on their face. The objection was overruled, the notes received, and both parties rested. The claim was allowed.

Thereupon the attorney for the executor took steps toward an appeal, but his notice of appeal was entirely lacking in the effective words, which, by affidavit hereafter mentioned, were asserted to have been intended to be,

"hereby appeals therefrom to the circuit court for Eau Claire county." Such mistake was not discovered until the statutory time for appeal had expired, whereupon within a year after the allowance of said claim A. C. Larson, apparently personally, made petition to the circuit court to allow an appeal to be taken. Larson asserts in affidavit that he is the attorney for *Johnson*, the executor. Such petition alleges the facts above stated, sets forth substantially the magnitude of the estate, the fact that the above-quoted words were omitted from the notice of appeal by error of the stenographer in extending on typewriter the notice as dictated to her, and that the omission was not discovered until about the time of the petition. No attempt at an affidavit of merits or to assert any defense to the notes was made, except the assertion in the petition, signed and sworn to by Larson, that the executor, *Johnson*, feels himself aggrieved by the allowance, deems himself without fault on his own part, and "believes that justice requires a revision of the case, for the reason that there never was any consideration for said notes, and the estate of said deceased does not owe the indebtedness thereby purported to be evidenced, or any part thereof, as said executor is informed and believes." Upon a hearing upon this petition, counter affidavits were introduced, embodying therewith a deposition of one Stumm to the general effect that the notes in question were signed by deceased, P. C. Larson, in his presence, for a harvester sold by such deponent as agent for the plaintiff; that both the signature and the dates of maturity were placed upon said notes by said Larson with lead pencil, and authority given to said Stumm to trace the same in with ink, which he did.

The circuit court made an order declaring that "the court being satisfied that the failure to perfect the appeal was accidental and without fault on the part of the appellant, but the court being further satisfied that justice does not

require a revision of this case, and that the defense is a technical one, and not being satisfied that there is a defense on the merits, now, therefore, it is ordered that said petition be, and the same is hereby, denied." From that order the executor appeals to this court.

A. C. Larson, for the appellant.

Arthur H. Shoemaker, for the respondent.

DODGE, J. The single question presented on this appeal is whether the circuit court abused its discretion in holding that appellant had not satisfactorily shown that justice required a revision of the case in compliance with sec. 4035, Stats. 1898. *Oakley v. Davidson*, 103 Wis. 101. The reasons urged for review are that the county court erred in admitting the notes in evidence, and that appellant's petition showed that he had a good defense on the merits.

The admission of the notes was objected to principally because they showed upon their face material alterations, but also because no proof was made of the authenticity of the signature. Without passing upon the first objection, a subject discussed in *Maldaner v. Smith*, 102 Wis. 30, it seems impossible to acquit the county court of error in overruling the second ground. The alleged maker of the notes being dead, the rule of the common law applied, and proof of his signature was necessary before they could be received. *Campion v. Schinnick*, 93 Wis. 111. This conclusion, however, is not final upon the question which the circuit court had to consider. Full justice may be done by a decision notwithstanding the commission of specific errors. Nay, more, a judgment may be unsupported by the record and proofs on which it was rendered, so that upon appeal to a court of errors it must be reversed, and yet it may appear that justice would not be promoted by revision. A judgment may be just, though erroneous. Obviously the allowance of the claim is not unjust by reason alone of the

erroneous reception of the notes in evidence, if the notes were in fact duly executed in their present form by the deceased. The petition does not suggest or assert that such is not the fact. The necessary inference from such silence is that the appellant was satisfied that the authenticity of the signature and of the notes themselves existed and could be proved. Otherwise he should and would have asserted at least his disbelief in such authenticity as one of the reasons for revision. Doubtless he was so convinced by the testimony of Jacob Stumm, taken by deposition some two weeks before the application was made, and at that time part of the files of the case in circuit court.

It thus appearing that the fact that the county court committed error in receiving the notes in evidence does not necessarily establish that justice requires revision, the question remains whether the allegation, sworn to by Larson, that *Johnson*, the appellant, "believes that justice requires a revision of the case for the reason that there never was any consideration for said notes, and the estate of said deceased does not owe the indebtedness thereby purported to be evidenced, or any part thereof, as said executor is informed and believes," is sufficient to convict the circuit court of abuse of discretion in denying to appellant the privilege of appealing.

The question whether justice requires revision in cases under sec. 4035 is not a technical one. It appeals to broad and intelligent judgment and discretion in the court, adapted to variant situations, and involving different considerations. The amount in controversy may be insignificant; a purpose of delay or obstruction may be apparent; applicant's views of the law may be mistaken; the facts on which he relies may be immaterial, or the evidence thereof frivolous or obviously insufficient. While, in deciding it, a genuine and substantial controversy arising from conflict between allegations of the petition and counter affidavits as to the facts

is not proper to be decided, but the facts properly asserted by the applicant which bear upon the merits are to be assumed as probably existing, and while all due liberality should be extended in favor of a full hearing, yet the burden is upon the applicant to satisfy the court that, in view of all the known facts, there is at least reasonable probability that upon further hearing a result more favorable to him will be reached. The court should be given opportunity to judge from the facts themselves, rather than from the applicant's conclusions or generalizations, and it is the latter's duty — since he is a supplicant for favor — to lay before the court, as fully and frankly as in his power, all the facts which he believes to justify him in making the application. *Groner v. Hield*, 22 Wis. 200; *Downer v. Howard*, 47 Wis. 476; *Marx v. Rowlands*, 59 Wis. 110, 114; *Jamison v. Snyder*, 79 Wis. 286, 288; *Shuman v. Hurd*, 79 Wis. 654, 658; *Oakley v. Davidson*, 103 Wis. 101; *Capen v. Skinner*, 139 Mass. 190; *Sanborn v. St. Clair Circuit Judge*, 94 Mich. 519, 526; *Jerome v. Wayne Circuit Judge*, 117 Mich. 19.

The field of discretionary consideration in allowing appeal after absolute right is lost is, as to this branch of the question, very similar to that involved in opening a default or setting aside a judgment to let in a defense. It has frequently been held in the latter class of cases that allegations as to a defense, made upon information and belief, are not sufficient to justify relief from a judgment and opportunity to defend. *Pinger v. Vanclick*, 36 Wis. 141, 145; *Superior C. L. Co. v. Dunphy*, 93 Wis. 188, 193; *Thayer v. Swift*, Walk. Ch. 384; *Meach v. Chappell*, 8 Paige, 135. Completed litigation should not be revived without full affirmative showing that there are valuable rights at least likely to be protected by further hearing, and the authorities last cited are not without weight as guides to circuit courts upon applications like the present. If such courts allow themselves to be satisfied by the information and belief of an applicant,

and exercise their discretion in favor of the appeal, it by no means follows that such discretion should be disturbed by this court. On the other hand, however, where the court vested with the discretion has exercised it the other way, and has refused to be satisfied of the probable existence of a defense when no facts tending to establish it have been presented, can it be said that clear abuse of discretion appears? It may well be that failure by petitioner to lay before the court any facts justifying his belief may have satisfied the court that the application was not in good faith and that no such facts existed. We do not, and presumably the circuit court did not, overlook the consideration that increased liberality should be accorded those who, like administrators, litigate in a representative capacity and with reference to transactions of which, *ex necessitate*, they can have only information and not personal knowledge. Nevertheless, if the applicant had a belief founded upon information, it follows necessarily that he could have stated to the court what information he had. If derived from documents, they could and should have been laid before the court; if from statements of other persons, affidavits from such others of the truth of their statements should have been presented, or applicant's inability to obtain them should have been explained. Such was the course pursued in *Jamison v. Snyder*, 79 Wis. 286, the only case in which this court has reversed the decision of a circuit court denying appeal. Not only was the application in this case lacking in the respects above suggested, but it contained no authentic assertion, even, that the applicant had either information or belief in the existence of any defense. The formal declaration by the attorney that his client has information and belief cannot, in the nature of things, be an allegation of anything within the former's own knowledge, and he does not attempt to state any ground for his assertion of his client's state of mind, not even that any disclosure thereof has been made to him by

the latter. Upon such an application, the court may well have been satisfied that neither the applicant nor his attorney had either knowledge or information of any facts likely to constitute any defense or to make allowance of appeal fruitful of anything except delay and expense to both parties. It was, at least, a field in which the statute vested him with discretion, which we cannot say has been abused.

By the Court.— The order appealed from is affirmed.

ALLEN and others, Appellants, vs. BOBERG, imp., Respondent.

108 282
109 369
108 282
d114 438

November 16 — December 7, 1900.

Appealable orders: Corporations: Insolvency: Stockholders' liability.

In an action to wind up a banking corporation and enforce the statutory liability of its stockholders, it was ordered that a defendant stockholder who had paid into court the par value of his stock be discharged from further liability and that the action be dismissed as to him without costs. *Held*, that such order was not in effect a final determination of the action as to said defendant, nor did it prevent a judgment from which an appeal might be taken, but on the contrary it contemplated such a judgment, and hence was not appealable under subd. 1, sec. 3069, Stats. 1898.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Appeal dismissed.*

L. A. Doolittle, for the appellants.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham.*

CASSODAY, C. J. In July, 1897, an action was commenced by Edward Boyle, as plaintiff, against the Commercial Bank of Eau Claire, as defendant, in which the bank was adjudged to be insolvent, and all its assets were collected by a receiver therein appointed therefor, and distributed by order

of the court to pay expenses and certain preferred and secured claims, leaving nothing for general creditors. It appearing that, in order to pay such creditors even in part, it was necessary that the stockholders of the bank be required to pay their statutory liability, the court, on September 24, 1897, ordered the receiver to proceed forthwith to enforce such liability. In the spring of 1898, upon the petition of a large number of the general creditors, a supplemental complaint was filed in such action in behalf of all the creditors and against all the stockholders to wind up the corporation and enforce such statutory liability against each of such stockholders — including the defendant *Otto Boberg* — for the full amount of their stock, respectively; the aggregate amount of which was less than the remaining unpaid indebtedness of the bank. The defendant *Otto Boberg* answered such supplemental complaint. Upon such issue being reached for trial, February 16, 1900, the defendant *Otto Boberg* tendered into court $600, the par value of his stock, and moved the court that said sum be accepted, and that he be discharged from all further liability in the action, and that the action be dismissed as to him, without costs. The court thereupon entered an order granting such motion, and ordering that the defendant *Otto Boberg* be discharged from all further liability in this action, and that this action be, and the same was thereby, dismissed as against him, without costs to either party. From that order the plaintiffs have taken this appeal, claiming that the defendant *Otto Boberg* is liable herein for interest and costs.

After careful consideration, we are constrained to hold that the order is not appealable. Sec. 3069, Stats. 1898. The right of appeal is claimed under the first subdivision of that section. True, the order was made in an action, and affected a substantial right; but it is not, in effect, a final determination of the action as against the defendant *Otto Boberg*, nor did it prevent a judgment from which an ap-

peal might have been taken. On the contrary, it contemplates the entry of a judgment in the action. Counsel for the plaintiffs seem to think that the order in question was, in effect, a judgment; but it is manifestly neither a final judgment nor an interlocutory judgment, within the meaning of the statutes (secs. 2883–2885). *Trustees of St. Clara Female Academy v. Delaware Ins. Co.* 93 Wis. 57, 69; *Hyde v. German Nat. Bank*, 96 Wis. 406. The order in question is not appealable. *Latimer v. Central E. Co.* 101 Wis. 310; *Latimer v. Julius Andrae & Sons Co.* 101 Wis. 311; *Chambers v. Jacobia*, 103 Wis. 37; *In re Minnesota & W. R. Co.* 103 Wis. 191. It does not belong to any of the classes of cases which have been held to be appealable under subd. 1, sec. 3069. See note to that section. *State ex rel. Meggett v. O'Neill*, 104 Wis. 227.

By the Court.— The appeal is dismissed.

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108 284
112 [2]385
108 284
114 [1] 82

MARTIN, Respondent, vs. ESTATE OF MARTIN, Appellant.

November 16 — December 7, 1900.

Defective adoption of child: Compensation for services: Presumption: Rebuttal: Void contract to leave property at death: Limitation of actions: Pleading: Estates of decedents: Special verdict: Finding construed: Validity of contract.

1. Where a boy was received into a family as a son, under defective adoption papers, and rendered services in that capacity, the presumption that such services were not to be paid for can only be rebutted by proof, either direct or circumstantial, which establishes an express contract to pay for them.
2. An oral contract in such case whereby, in consideration of his mother's consent to the adoption of the boy and of his services to be rendered as an adopted son, the person intending to adopt him agreed that she would give him all her property, real and personal, at her death, is void as to the real property under the statute of frauds and, being indivisible, is wholly void; but such a contract

nevertheless rebuts the presumption that the services of the boy were to be gratuitous.

3. When, in such case, the services of the boy had ceased and he had attained his majority, he could, if entitled to recover at all, have made his demand and brought action for the value of his services, the void contract being no defense and of no effect to extend the time of payment; and the statute of limitations began to run accordingly.

4. Under sec. 3841, Stats. 1898, the statute of limitations need not be pleaded as to a claim against the estate of a decedent.

5. In view of the language used in the questions submitted for the special verdict, of the instructions given to the jury, and of the evidence returned to this court on appeal, a finding of the jury that a person promised and agreed to devise real estate is *held* to be equivalent merely to a finding of an oral promise or understanding, and not of a valid (i. e. a written) agreement, although the verdict does not specifically state that it was oral, and although the bill of exceptions is not certified to contain all the evidence.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Reversed.*

This is a claim against the estate of Catherine Martin for personal services. The claim was filed in the county court of the proper county, as follows:

Estate of Catherine Martin, Deceased.
To Frank Martin, Dr.

To services from 1872 to 1885, inclusive, payable at death of Oliver Martin and Catherine Martin, 13 years	$2,300
To cash given to Catherine Martin in 1891	100
Total	$2,400

The claim was duly verified, and the administrator of the estate filed a general denial and pleaded the statute of limitations. After a trial the claim was disallowed in the county court, and the plaintiff appealed, and the action was tried before a jury in the circuit court. There were some facts which were undisputed, which may be stated as follows:

In 1873 Catherine Martin and Oliver Martin, her husband, occupied a farm in Jackson county, in this state, the title to which was in Catherine. In the last-named year, having no

children of their own, Catherine and Oliver took the plaintiff, who was then a boy eight years of age, to live with them upon the farm, under a promise made to the plaintiff's mother, who had been deserted by her husband, that they would adopt the plaintiff and make him heir of their property. No legal adoption was, however, made. The plaintiff thereafter lived with the Martins, doing such work as he was capable of, until some time between the years 1883 and 1886, being treated as a son and furnished clothes, board, and a limited amount of schooling. He assumed the name of Frank Martin, and supposed that he had been adopted as their son. He left the Martins not later than some time in the year 1886, and never returned to do any work for them thereafter. He reached the age of twenty-one years in the year 1886. Oliver Martin died in the year 1894, and Catherine in the year 1897, both intestate; and Catherine leaving as her estate the aforesaid farm, worth about $1,500, and a small amount of personal property, not exceeding $500.

The jury returned a special verdict as follows: "(1) Did the deceased, Catherine Martin, and her husband, Oliver Martin, and the mother of plaintiff, about the year 1873 execute certain papers, by which it was intended that said Catherine Martin and Oliver Martin should adopt plaintiff as their son and heir? Yes. (2) Did said Catherine Martin at the time of the making of such papers, and in consideration that the mother of plaintiff consented to such adoption and that said plaintiff should live with her and render services to her as such adopted son, promise and agree with plaintiff, acting by his mother, that at the death of said Catherine she would make plaintiff her sole heir at law, and give to him all her property, both real and personal, at her death? Yes. (3) Did said Catherine Martin afterwards, and during the time plaintiff lived with her, by her acts, statements, and conversations, lead plaintiff to believe that she would devise and bequeath to him at her death all her prop-

erty, in consideration of such adoption and services being rendered by plaintiff? Yes. (4) Did plaintiff perform labor and services, pursuant to such agreement and with the expectancy of so being compensated, for said Catherine Martin, from about the spring of 1873 until plaintiff left said Catherine? Yes. (5) What was the value of the labor and services so rendered to said Catherine Martin during the said period, over and above his care, clothing, board, education, and all other things of value received by plaintiff from said Catherine or her husband? $900. (6) Did said Catherine fail to perform her part of said alleged agreement, by failing to devise and bequeath her said property to plaintiff, and to compensate said plaintiff for such services? Yes. (7) Was said plaintiff in fact never adopted as the son and heir of said Catherine, by failure to complete the necessary proceedings according to law to make such proceedings effective? He was never adopted, the proceedings being ineffectual for that purpose. (8) Were these services of plaintiff performed for Catherine Martin, and upon the separate property and estate of said Catherine Martin, and in her separate business? Yes. (9) Did Catherine Martin, by the employment of plaintiff and by said agreement, intend to charge and bind her separate estate? Yes. (10) (At request of defendant's counsel.) Did Catherine Martin and her husband, Oliver Martin, act jointly in any and all agreements made or signed by them for the adoption of said Frank Martin? Yes."

The defendant moved to set aside the verdict, and also moved for judgment thereon for the defendant, which motions were overruled, and judgment entered in favor of the plaintiff upon the verdict for $900 damages and costs, from which judgment the estate appeals.

G. M. Perry, for the appellant.

For the respondent there was a brief by *Castle & Castle*, and oral argument by *B. J. Castle*. To the point that, had

the full record been before this court, the rule established by the following cases would apply and be decisive, they cited *Kofka v. Rosicky*, 41 Neb. 328; *Wright v. Wright*, 99 Mich. 170; *Quinn v. Quinn*, 5 S. Dak. 328; *Bell v. Rice*, 50 Neb. 547; *Ellis v. Cary*, 74 Wis. 176; *Estate of Kessler*, 87 Wis. 660; *Slater v. Estate of Cook*, 93 Wis. 104; *Carmichael v. Carmichael*, 72 Mich. 76; *Schwab v. Pierro*, 43 Minn. 520.

WINSLOW, J. The bill of exceptions is not certified to contain all the evidence; hence we are relieved from the consideration of the question whether the verdict, or any part of it, is supported by the evidence, and the only important question in the case is whether the verdict and admitted facts sustain the judgment.

The facts may be briefly summarized as follows: A boy eight years of age is taken by a woman into her family under incomplete or defective adoption papers, coupled with an oral agreement with the boy's parent to leave him her property, consisting principally of real estate, in consideration of the boy's services. No legal adoption takes place, but the boy stays and does the ordinary work of a boy on a farm, and is treated as a son, until he is somewhere from eighteen to twenty-one years of age, when he leaves and never returns to render services. Afterwards the woman dies intestate, leaving as her estate the real property before mentioned and a trifling amount of personal property. The claimant then files his bill for the reasonable value of his services, which ceased at least eleven years before the death of the woman. Can he recover?

Under well-settled rules of law adopted by this court, this question must be answered in the negative. Although not of kin to the intestate, the plaintiff was received into her family as a son, and the services rendered by him were rendered in that capacity; hence the presumption is that they were not to be paid for, and that presumption can only be

rebutted by proof, either direct or circumstantial, which establishes an express contract to pay for them. *Tyler v. Burrington*, 39 Wis. 376; *Wells v. Perkins*, 43 Wis. 160. The express contract which was shown was oral, and was in part a contract to devise real property, and hence within the statute of frauds (Stats. 1898, sec. 2304), and, being void as to the real estate, and indivisible, is void in whole. *Ellis v. Cary*, 74 Wis. 176; *Estate of Kessler*, 87 Wis. 660, and cases cited. This contract, though absolutely void, still has the effect of rebutting the presumption that the services were to be gratuitous (*Estate of Kessler, supra*), and so opening the way to a recovery of the reasonable value of the services (*Koch v. Williams*, 82 Wis. 186, and cases cited).

Manifestly, however, the void contract did not extend the time of payment for the services, and the plaintiff, if entitled to recover at all, could have made his demand and brought his action in 1886, when his services had wholly ceased and he had attained his majority. The supposed contract would have been no defense to the action, because the statute in this state makes it void. *Thomas v. Sowards*, 25 Wis. 631. Not having brought his action, it was barred by the six-year statute of limitation (Stats. 1898, sec. 4222) before the death of the intestate in 1897.

A claim is made that the statute of limitations was not properly pleaded, but, as this is a claim against an estate, it was not necessary to plead it. The statute forbids the allowance of a claim which is shown to be barred by the statute of limitations. Sec. 3841.

We are aware that there are authorities in other states holding that an oral contract similar to the one before us is not void, but may be specifically enforced on the ground of partial performance. *Wright v. Wright*, 99 Mich. 170, and cases cited. It is enough to say, however, that this court has not adopted that rule.

We have discussed the case upon the basis that it is estab-

lished that the agreement to devise property to the plaintiff was an oral one, but we have not overlooked the fact that the verdict does not in specific language declare it to have been oral. The second question of the verdict asks the jury whether Catherine Martin at the time of the making of the adoption papers *promised* and *agreed* that she would give the plaintiff all her property, real and personal, at her death, and to this question the jury have given an affirmative answer. Now, it may be argued that this finding is a finding of a valid (i. e. a written) promise or agreement, and that in the absence of a complete bill of exceptions it must be conclusively presumed that there was evidence to support the finding; hence that it must be deemed a fact in the case that the agreement was in writing and valid. Whether this contention could avail the plaintiff anything in an action brought to recover the value of his services, in which he must repudiate the contract in order to recover, would seem to be a serious question; but, however that may be, we think that the only fair and reasonable construction of the finding is that the promise was oral. It will be noticed that the first question and answer find specifically that the parties *executed* certain supposed adoption papers, and that the second question omits all reference to the execution of any papers, but simply asks the jury whether Catherine Martin did "promise and agree" to give the plaintiff her property at the time of the making of the adoption papers. The careful reference to the *execution of papers* in the first question, and the equally careful omission of all such reference in the second question, clearly indicate to any mind that the second question refers to an entirely different kind of an agreement or promise, and one not evidenced by the execution of any papers; and we cannot escape the conclusion that a jury would at once answer the second question in the affirmative if they were satisfied of the making of an oral promise.

When, moreover, the charge which was given to the jury in connection with the second question is considered, there can be no doubt, we think, that the affirmative answer to the question must be construed as simply the finding of an oral promise. This charge was as follows: "This question you will answer, also, from the consideration of all the evidence: *Was it the understanding with the plaintiff's mother and the Martins that the latter should adopt the plaintiff and make him their heir?* And did the plaintiff's mother consent to the proposed adoption on such conditions? This is a question of fact, and you will answer it in such a way as the evidence will warrant." Here the jury are plainly told that the question is whether there was an *understanding* between Mrs. Martin and the plaintiff's mother. If the jury paid heed to this instruction,— and we must assume that they did,— then their affirmative answer to the question is equivalent merely to a finding that there was an oral "understanding" between the parties. As matter of fact, all the evidence returned which bears on the subject shows that the agreement was by parol; but this is not, of course, conclusive, in the absence of a certificate showing that all the evidence is returned.

By the Court.— Judgment reversed, and action remanded with directions to enter judgment dismissing the claim.

WHEREATT, Respondent, vs. WORTH and another, imp., Appellants.

108 291
114 *184

108 291
115 *466

November 16 — December 7, 1900.

Limitation of actions: Pleading: Demurrer: Amendment: Discretion: Review on appeal: Stare decisis.

1. Subd. 7 of sec. 2649, and sec. 2651, Stats. 1898, permit a complaint to be demurred to because the action was not commenced within the time required by law, only upon condition that the particular sec-

tion of the statute of limitations or subdivision of a section relied upon be thereby specifically pointed out.

2. The court has the same discretionary power to permit an amendment to a pleading setting up the statute of limitations as to permit any other defense to be so pleaded.

3. The doctrine that the bar of the statute of limitations extinguishes the right involved and creates a new one in the adverse party which is in the nature of property, within the meaning of that term as understood in respect to constitutional guaranties, is not in harmony with the doctrine that the defense of the statute of limitations is unconscionable and that a trial court may, in the exercise of its discretionary power, on that ground alone, refuse in all cases to permit it, where its availability depends upon judicial favor.

4. The judicial policy that regards statutes of limitations in an unfavorable light and defenses under them unconscionable, is not in accord with the legislative policy. The latter ought to prevail.

5. In a matter properly regarded as purely discretionary with the trial court, its action, reasonably in accord with a supreme judicial rule, will not be disturbed to satisfy the necessities of a particular case, though the rule itself be so discountenanced as to in effect change it.

6. In accordance with the principles stated, the decision of the trial court, refusing to permit a demurrer to be amended so as to cure an excusable and excused mistake in respect to pleading the statute of limitations, is affirmed, while the reason upon which the decision is grounded is discountenanced so far as being a safe guide for future judicial administration.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to recover on an appeal bond. A good cause of action was stated against *H. C. Ellis*, *John J. Worth*, and others who were made defendants, and the right to recover thereon was good but for the statute limiting the time for the commencement of the action. The defendants above named separately demurred on the ground that the action was not commenced within the time limited by law, but did not, in the demurrers, refer to the particular statute upon which they relied, other than as the six-years statute of limitations. Plaintiff moved to strike out the demurrers as

frivolous. The motions were submitted March 22, 1898. April 2, 1899, and while the circuit judge yet had under advisement the questions raised by the motions to strike out the demurrers as frivolous, defendants moved the court for leave to amend their demurrers by specifying the particular statute of limitations referred to therein. Defendants' motions were denied and plaintiff's motions granted, leave being granted to each of the defendants to answer the complaint upon paying $10 costs and waiving the defense of the statute of limitations. Defendants declined to answer upon the terms imposed, and thereupon judgment was duly rendered against them according to the prayer of the complaint.

For the appellants there was a brief by *J. F. Ellis*, attorney, and *W. F. Bailey*, of counsel, and oral argument by *Mr. Bailey*.

For the respondent there was a brief by *L. A. Doolittle* and *A. J. Sutherland*, and oral argument by *Mr. Doolittle*.

MARSHALL, J. Appellants' counsel contend, first, that the proper statute of limitations was sufficiently pleaded by the demurrers; second, that the court erred in refusing to permit the demurrers to be amended by referring to the section of the statutes relied upon. Some other points are suggested in counsel's brief, but they are not considered of sufficient importance to warrant discussing them in this opinion.

1. The first contention cannot be sustained. The statutes governing the subject are very plain. Subd. 7, sec. 2649, Stats. 1898, says that a defendant may demur to the complaint upon the ground that "the action was not commenced within the time limited by law." Sec. 2651 says that a demurrer upon the ground that the action was not commenced within the time limited by law may be stricken out on motion unless it contain "a reference to the statute claimed to limit the right to sue." This court, in *Clarke v. Lincoln Co.*

54 Wis. 578, inferentially decided that a reference to the particular section or subdivision of a section applicable to the case, in a demurrer, is required in order to satisfy the calls of the statute; and the point was directly decided by this court in *Crowley v. Hicks*, 98 Wis. 566. The holdings are the same elsewhere under similar statutes. *Manning v. Dallas*, 73 Cal. 420; *Onderdonk v. San Francisco*, 75 Cal. 534; *Stewart v. Budd*, 7 Mont. 573. The law authorizing the defense of the statute of limitations to be interposed by demurrer upon condition that the demurrer point out the statute relied upon, came in by the adoption of the revision of 1878. Since that time, it is believed, no case can be found where the sections referred to were not complied with, the sufficiency of the demurrer was challenged on that ground, and it was held good. Cases where a limitation statute was pleaded by answer are not in point. There is no statute requiring the plea of the statute of limitations by answer, strictly so called, to specify the particular statute relied upon.

2. Did the court err in refusing appellants leave to amend their demurrers? The contention in that regard is not free from difficulty. The situation of appellants is one of peculiar hardship, looking at it as involving a valuable right lost by excusable mistake; and we cannot view it in any other way, as an original proposition. It seems that appellants should have been relieved from their error without hesitation, upon their complying with such terms as would have placed respondent in substantially the same position he was in before the demurrers were interposed, unless it was proper for the circuit court, in the exercise of judicial discretion, to refuse to grant the defendants the benefit of a valuable right which they never intended to surrender — in effect, to compel them to pay a large claim which the law had once extinguished. We apprehend that the learned trial court took that view of the matter when

the motions for leave to amend the demurrers were presented, and that, in the decision, he was governed by the idea often found expressed in the decisions of this court, that the defense of the statute of limitations is unconscionable and not to be favored by the courts; that whenever the right to insist upon it is dependent upon the favor of the court, though that favor be required in order to avoid a purely excusable mistake, the court may properly compel the party to pay the penalty therefor of an entire forfeiture of his right. We cannot readily say that the trial court was not justified in that position and that the judgment can be disturbed, without ignoring the rule of *stare decisis*, which is grounded upon the idea that it is better to abide by a wrong rule firmly established than to seek to avoid or right it at the expense of those who have relied upon it. That doctrine has controlling force where the wrong rule of law has become a rule of property, unless the circumstances indicate an overpowering necessity to change it, which necessity cannot be satisfied by the exigencies of any particular case. When, however, the rule of *stare decisis* is invoked to secure adherence to a wrong doctrine which may be corrected without prejudice to any one other than a party before the court, and others similarly situated as regards pending litigations, where no rule of property is required to be changed, courts are not so firmly bound by a previous ruling but that they may correct it with considerable freedom, if firmly convinced that it stands in need of correction.

The facts of this case seem to call upon the court very strongly for relief and to require a favorable answer to the application therefor, unless the law is so firmly established otherwise that it cannot be so abruptly disturbed as is necessary to accomplish that end, or unless the trial court had such reasonable ground to suppose that the law was so firmly established that it cannot be said that the boundaries of judicial discretion were overstepped in reaching the result complained of.

Appellants, before interposing their demurrers, owed the respondent nothing. Respondent's cause of action was extinguished by his own laches. The right of appellants had, by force of the statute, superseded respondent's rights, and was secured to them by constitutional guaranties the same as any property right, as we shall see later. They never intended to part with that right. They failed for the moment to properly insist upon it because of misapprehension on the part of their attorneys of the scope of the statute as regards insisting upon it by demurrer. They were guilty of no fault from which they would not have been promptly relieved, as regards the defense of payment or any legitimate counterclaim or any ordinary defense, effective to defeat the plaintiff's claim. They acted with sufficient promptness in asking to be relieved from the error of their attorneys, and the ordinary terms imposed for granting leave to amend a pleading would have amply saved the respondent from prejudice by the delay, yet the favor was denied and a claim that in law did not exist when the action was brought to enforce it was thereby resurrected and fully re-established.

Viewing the situation as above indicated, it seems to call so strongly for a remedy as to justify the court in taking a retrospective view of our judicial policy as found in the books, in order to see just where we stand with reference to the defense of the statute of limitations. Is it, or if it is, should it be considered, an unconscionable defense, so that the court, upon a trifling pretext, can justly deny to a party the right to interpose it when that right depends at all upon judicial pleasure? It is considered that we are justified in using the term "trifling pretext" as an original proposition, and as applied to the case before us, since, as stated, it is plain that the appellants never intended to waive their statutory right in the first instance and that respondent would not have been prejudiced in any substantial degree if the court had allowed the application for relief from the mistake.

Anciently there was no system of limitation statutes as we understand the term. The first attempt at such a system was made by Stat. 32 Hen. VIII. ch. 2, which was superseded by Stat. 21 Jac. I. ch. 16. From that the limitation statutes in most of the states of the Union, including our own, have been modeled. The books indicate that the innovation upon common-law methods was not at first received favorably by the courts. It was held that it merely deprived the possessor of a right to the use of judicial machinery to enforce it, leaving the right itself otherwise unimpaired, with such a moral obligation upon the part of the person adversely interested to recognize it that it was dishonorable, in a sense, to insist upon the statutory defense thereto. That idea was transplanted to this country as part of the common law. In time, however, the legislative purpose to put forever at rest a claim against which a statute of limitations has completely run, in the absence of distinct acts intended on both sides to revive it, came to be recognized as controlling, and the duty of the courts to give effect thereto to be fully recognized. The effect was to largely or wholly do away with the idea that the defense of the statute of limitations is unconscionable and that courts should so exercise judicial functions as to prevent its operation, and to lead to the contrary idea, that such statutes are highly beneficial, and that defenses under them constitute vested rights protected as such by constitutional guaranties and entitled to such protection the same as other property rights.

The radical change in judicial policy indicated is sufficiently shown by numerous expressions in legal opinions, of which the following are but a few of the many examples that might be given: "The court here disclaims all right or inclination to put on acts of limitation, which are among the most beneficial to be found in our books, any other construction than their words naturally import. It is as much

its duty to give effect to laws of this description, with which courts, however, sometimes take great liberties, as to any other which the legislature may be disposed to pass." LIVINGSTON, J., in *Fisher v. Harnden*, 1 Paine, 55, 61. "I consider the statute of limitations a highly beneficial statute, and entitled as such to receive, if not a liberal, at least a reasonable construction, in furtherance of its manifest object. It is a statute of repose. . . . The defense which it puts forth is an honorable defense. . . . There is wisdom and policy in it, as it quickens the diligence of creditors and guards innocent persons from being betrayed by their ignorance or their overconfidence in regard to transactions which have become dim by age. Yet I well remember the time when courts of law exercised what I can but deem a most unseemly anxiety to *suppress the defense;* and when, to the reproach of the law, almost every effort of ingenuity was exhausted to catch up loose and inadvertent phrases from the careless lips of the supposed debtor, to construe them into admission of the debt. *Happily, that period has passed away; and judges now confine themselves to the more appropriate duty of construing the statute, rather than devising means to evade its operation.*" STORY, J., in *Spring v. Gray*, 5 Mason, 505, 523. "The statute of limitations is entitled to the same respect with other statutes, and ought not to be explained away." MARSHALL, C. J., in *Clementson v. Williams*, 8 Cranch, 72. "It has often been matter of regret in modern times that in the construction of the statute of limitations the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in any unfavorable light, *as an unjust and discreditable defense*, it had received such support as would have made it, what it was intended to be, emphatically a statute of repose. . . . English decisions upon this subject have gone to great lengths. . . . There appears at present a disposition on the part of the

English courts to retrace their steps. . . . The American courts have evinced a like disposition." STORY, J., in *Bell v. Morrison*, 1 Pet. 351, 360. To the same effect are *Wood v. Carpenter*, 101 U. S. 135, and *McCluny v. Silliman*, 3 Pet. 270. Statutes of limitation, "especially when relating to land, are entitled to and have generally received from this court a *favorable regard* and a liberal construction, with a view to the attainment of their objects." *Phillips v. Pope's Heirs*, 10 B. Mon. 163. "The statute of limitations is a *well-marked favorite*." *Cooper v. Cooper*, 61 Miss. 676. To the same effect is *Hart's Appeal*, 32 Conn. 520. 'Amendments to avoid the statute of limitations cannot be allowed.' "We are aware there are some cases the other way, based upon early decisions made when the statute of limitations was looked upon as *a hard and unconscionable defense*. But we can recognize no sound principle upon which such decisions can rest. Statutes of limitations are now quite generally looked upon as statutes of repose, and just as essential to the general welfare and the wholesome administration of justice as statutes upon any other subject, and to be construed with the same favor to effect the legislative intent. *People ex rel. Gorman v. Newaygo Circuit Judge*, 27 Mich. 138.

The foregoing fairly indicates the view generally taken of limitation statutes at the present date. There are decisions here and there that are not in harmony with the modern doctrine, but the weight of authority is so great in support of it that it has been generally written into the text-books as settled law. In 13 Am. & Eng. Ency. of Law (1st ed.), 692, it is said that statutes of limitations are now almost universally regarded favorably as statutes of repose; and the decisions to the contrary are disapproved, citing a multitude of cases. To substantially the same effect are 1 Wood, Limitations, 7, and Angell, Limitations (6th ed.), 18.

Turning to the decisions of this court it will be found that the foundation idea which led to the early perversion of the

legislative purpose in devising a system of limitation statutes,— that they were designed to act on the remedy only, taking that away but leaving the legal right otherwise unimpaired,— was rejected at the commencement of our judicial history. In that respect more advanced ground was early taken here than that then or since occupied by many courts which have rejected the old notion that limitation statutes are to be strictly construed and defenses under them treated with disfavor. The idea that a defense under such a statute is unconscionable and that courts may properly or ought to so discountenance as to defeat it wherever judicial favor is necessary to its availability, is grounded generally on the theory that the right is never extinguished by the statute. The idea that it extinguishes the right upon which it operates as effectually as payment, and creates a new right which cannot be taken away by legislative power or judicial action without the consent of its possessor,— a right in the nature of property protected by constitutional guaranties,— it would seem is not wholly consistent with the idea that the assertion of such right is dishonorable and should be treated that way by the courts.

In *Sprecher v. Wakeley*, 11 Wis. 432, it was held that if the bar of the statute is complete the legislature is powerless to give a remedy for the enforcement of the old right; that it is a mistake to suppose that a limitation statute affects the remedy merely; that it directly extinguishes the right by creating another in its place of just as high a character as regards constitutional protection. That doctrine has been steadily adhered to up to the present time, the most recent and significant recognition of it being in *Eingartner v. Illinois S. Co.* 103 Wis. 373, where it was said that 'a bar to a claim created by the operation of a statute of limitation is as effectual as payment or any other defense; that it creates a vested right of defense which of itself must be regarded as a species of property within constitutional

guaranties; and that it completely supersedes, annuls, and extinguishes that upon which it operates.'

From what has been said it would seem that the doctrine that the defense of the statute of limitations is discreditable should not be maintained alongside of the doctrine that the bar of the statute extinguishes the right upon which it operates. The former seems to have found a place in the decisions of this court, at first in *Orton v. Noonan*, 25 Wis. 672. In *Plumer v. Clarke*, 59 Wis. 646, it was said, in substance, that the effect of the decisions of this court is that the defense of the statute of limitations by an individual is unconscionable, but that such a defense by a municipality is not so regarded. That is well entrenched in our jurisprudence and is wholly of judicial creation and confined within quite narrow limits. In later cases the defense under discussion was treated substantially the same as other defenses, though the court adhered to the doctrine that it is unconscionable.

In *Smith v. Dragert*, 65 Wis. 507, there was a failure to plead the statute in the first instance through ignorance of the defendant's attorney. The trial court held that a special plea of the statute was unnecessary. For that error the judgment was reversed on appeal to this court. Subsequently the trial court relieved the defendant from the mistake of his attorney on payment of $10 costs and the costs of the action up to the time of applying for such relief. This court said that such action was a proper exercise of judicial discretion. In *Illinois S. Co. v. Budzisz*, 106 Wis. 499, such an amendment was allowed on the trial to avoid the mistake of the defendant's attorney, no terms being imposed other than that the trial should not be delayed. That was held a proper exercise of judicial discretion, it appearing that the plaintiff was not prejudiced by the delay in pleading the statute. Following other decisions it was said, in effect, that the discretionary power of the court to relieve a party from excusable mistake in respect to pleading the statute of limitations

is the same as in respect to any other mistake in making up the issues in a case for trial. In this connection, without referring to the cases in detail, it may be said that no case can be found in our books where the discretionary power of the trial court to allow the statute of limitations to be pleaded by amendment has been denied, or where the exercise of that power has been disturbed, except for clear abuse of judicial discretion in that the favor was granted without the imposition of terms to prevent the opposite party from being prejudiced by the delay. In the very recent case of *Sullivan v. Collins*, 107 Wis. 291, the trial court permitted such an amendment upon the trial without any excuse for the delay being given or any terms or conditions of granting the favor being imposed. That, on appeal, was held an abuse of discretion, reference being made to the doctrine as established, that the defense of the statute of limitations is not treated with the same favor as ordinary defenses and is classed as unconscionable. It was recognized, however, that the power of the court to allow such an amendment is as broad as to allow any other, subject to such exercise as to indicate some degree of judicial discretion.

In view of the foregoing, testing the decision appealed from by right in the abstract, we might well hold that it is clearly wrong. But we must go further, since there is reasonable ground to say that the judicial policy of this state is not clearly in harmony therewith. Notwithstanding the fact that the defense of the statute of limitations is here placed on the highest plane as regards its legal status, and the fact that in the course of our judicial administration a defense of the statute of limitations has been treated the same as others, the idea that there is an element of dishonor involved in the assertion of it, which stamps it as unconscionable, has not been removed from our system. It is preserved therein by the latest expression of the court on the subject, as above indicated.

It follows that we cannot say but that a trial court might reasonably consider, in deciding upon an application for judicial favor for relief from a mistake in failing to properly plead a vested right under a limitation statute, that the assertion of the right is in a sense dishonorable and upon that theory alone deny the application, regardless of the excusability of the mistake and of the ability of the applicant to save the opposite party harmless from injury because of delay in pleading the defense. Trial courts are expected to be guided by the decisions of this court, and where they reasonably submit to such guidance and considerately decide accordingly, their decisions should not be disturbed even though the result be that the question involved, as an original proposition, is decided wrong. The rule of *stare decisis* must go that far, even where the judicial rule involved, though wrong, need not be sustained as a rule of property, the disturbance of which would be injurious to public interests. Such an adherence to judicial policy may cause a sacrifice of individual rights in a case now and then, but it is better that it should be that way than that the result of a fair exercise of judicial discretion should be invaded. That does not militate at all against judicial freedom in appellate courts to correct their own errors in all proper cases.

The result is that we must hold that the trial court did not overstep the boundaries of judicial discretion in refusing appellants leave to amend their demurrers, while at the same time it is made sufficiently significant as not to be lost sight of hereafter that the logical result in the whole is to discountenance the seeming inconsistency between the doctrine that the bar of the statute of limitations extinguishes the right and creates another in the nature of property protected by constitutional guaranties, and the doctrine that the assertion of such new right is unconscionable. That makes harmony here, and, as regards the nature of the defense discussed, substantial harmony between the doctrine

here and the weight of authority elsewhere, and gives full effect to the legislative purpose.

By the Court.— The judgment of the circuit court is affirmed.

A motion by the appellants for a rehearing was, on February 1, 1901, held to have been waived by failure to serve and submit the arguments within the time required by Rule XX of this court.

MUELLER and others, Appellants, vs. EAU CLAIRE COUNTY and others, Respondents.

November 16 — December 7, 1900.

(1) *County insane asylum: Letting of contracts: Lowest bidder: Discretion.* (2) *Injunction against illegal contract: Action by taxpayer: Individual interest.* (3) *Building contract: Alterations.*

1. Under secs. 603, 604, Stats. 1898 (providing that upon the adoption of plans for buildings for a county insane asylum by the county board, that body may "proceed to contract for the construction of said buildings, with the lowest bidder or bidders, for all the work and material required therefor"), no discretion is vested in the county board to award the contract to the person whose bid, in their judgment, is the most advantageous to the county, but they must let the contract to the person who has offered to do the work for the least money.
2. A taxpayer may maintain an action to restrain a county from carrying out an illegal contract which will cast a burden of debt on the county, whether his individual loss will be great or small.
3. The insertion, in a contract for the construction of a county insane asylum, of a clause (usually put in building contracts) permitting the building committee to require alterations, additions, or omissions from the work specified without avoiding the contract, is not an evasion of the statute (sec. 604, Stats. 1898) declaring that the county board shall prepare "complete" plans and specifications for the work. Such a clause permits only the making of such changes as will not substantially alter the character of the building or increase its cost to an unreasonable amount.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

The plaintiffs *Stockwell* and *Van Hovenberg* are residents and taxpayers of the county of *Eau Claire*, and bring this action on behalf of themselves and other taxpayers. They join with them *L. J. Mueller*, who was the lowest bidder for the work hereinafter mentioned, but is admitted not to be a necessary party. The defendants are *Eau Claire County*, *W. H. Hobbs*, the contractor, and certain members of the county board of supervisors, who had charge of the erection of a county asylum for the chronic insane.

The complaint sets out that the county had decided to erect a building for that purpose; the appointment of the committee, who had secured plans and specifications for the building and another set for the heating apparatus to be used therein; the advertisement for bids for the erection of the building and for separate bids for the heating plant. It then details the requirements of the notice for bids, and compliance therewith by the plaintiff *Mueller;* that the contract for the erection of the building was awarded to one Long; that plaintiff *Mueller* offered to put in the heating plant for $6,172, which was the lowest bid. He notified the committee of his readiness to enter into a contract and furnish the required bond, but the committee rejected his bid and accepted the bid of the defendant *Hobbs*, whose bid was $6,175, and entered into a written contract with him. The complaint further states that the acts of defendants were attempted to be performed under secs. 603, 604, Stats. 1898, and that the letting of the contract to *Hobbs* was in violation of sec. 604; that their rejection of *Mueller's* bid was without any cause or reason, except that the committee desired to favor *Hobbs* and give him an unlawful preference, and that the defendants threatened to carry out such unlawful contract. A temporary and permanent injunction was prayed for.

To this complaint the defendants made answer which substantially admits the allegations of the complaint with reference to the erection of the building, reception of bids, and letting of contracts. It then sets out the bids of *Mueller* and *Hobbs*, and as a reason for accepting the bid of the latter it alleges, in substance, as follows: *Mueller* lived at Milwaukee, 250 miles from Eau Claire. He was wholly unknown to the committee. *Hobbs* was a resident of Eau Claire, and well known to the committee, and for many years had been engaged in doing similar work, and was known to be responsible and of ability to perform such work. The committee believed it was probable that, as the work progressed, changes might be necessary in some of the details of the work, and that such matters could be more easily arranged with a contractor who was close to the place of the work, and who, it was supposed, would give his personal attention to it. The committee further realized the fact that an act of incompetency or unfaithfulness in the performance of the work might bring losses to the county, "which in comparison would dwarf into absolute insignificance (if it is not already so) the sum complained of;" that in jobs of this kind defects were likely to occur which might not be discovered as the work progressed, or until the plant was in active use, and which could be more readily remedied by a contractor near at home; that in case of repairs they could be more readily and cheaply obtained from the person who constructed the work. Reference was made to certain provisions of the contract to the effect that the drawings, plans, and specifications were intended to co-operate, and that work mentioned in one and not in the other was to be executed as though mentioned in both, without extra charge. Questions would constantly arise with reference to such matters which made it essential that the contractor should be on the ground so they could be arranged as the work progressed, and the committee believed better and more satisfactory results could be obtained

in the adjustment of such matters with the defendant *Hobbs*, by reason of their knowledge of his business methods, than could be obtained from *Mueller*, whom they did not know. The answer then alleged that the other plaintiffs were only assessed to the amount of $400 in property in the county, and that the additional tax they would be required to pay would be only the fractional part of a mill; that *Hobbs* had paid to the county treasurer the sum of $3 to be applied on the contract.

To this answer the plaintiffs demurred on the ground that it did not state facts sufficient to constitute a defense. On the hearing it was urged that the complaint did not state a cause of action. The court so found, and sustained the demurrer to the complaint. From the order so entered the plaintiffs have taken this appeal.

For the appellants there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*. They argued, among other things, that laws requiring public contracts to be let to the lowest bidder are binding, and will be strictly enforced by the court. All contracts awarded in violation of such laws are illegal and void, and persons performing work thereunder are entitled to no compensation therefor. *Mitchell v. Milwaukee*, 18 Wis. 92; *Wells v. Burnham*, 20 Wis. 112; *Ricketson v. Milwaukee*, 105 Wis. 591–604; *Brady v. New York*, 20 N. Y. 312; *People ex rel. Coughlin v. Gleason*, 121 N. Y. 631; Tiedeman, Mun. Corp. § 172; 1 Dillon, Mun. Corp. § 466; *Addis v. Pittsburgh*, 85 Pa. St. 379; *Richardson v. Grant Co.* 27 Fed. Rep. 495; *Murphy v. Napa Co.* 10 Cal. 497; *Heidelberg v. St. Francois Co.* 100 Mo. 69; *Townsend v. Holt Co.* 40 Neb. 852; 15 Am. & Eng. Ency. of Law (1st ed.), 1091, and cases cited. When bids are advertised for and are filed in compliance with the advertisement, their merits both actual and relative must be determined solely by a consideration of the terms and conditions set forth in the advertisement or other public notice, and

an award on other grounds and considerations will be invalid. Tiedeman, Mun. Corp. § 173; *Shaw v. Trenton*, 49 N. J. Law, 339; *Mazet v. Pittsburgh*, 137 Pa. St. 548.

DeAlton S. Thomas, district attorney, and *W. F. Bailey*, attorney for *Hobbs*, for the respondents, contended, *inter alia*, that where the injury is so trifling as in this case a court of equity will not interfere. Anderson, Law Dict. 615; *Campbell v. Mellen*, 61 Wis. 612; *Randall v. Dailey*, 66 Wis. 285; *Kelley v. Corson*, 8 Wis. 182; *Payne v. Jelleff*, 67 Wis. 246; *Smith v. Bowen*, 61 Wis. 258; *In re Thurston*, 57 Wis. 104; *Meggett v. Eau Claire*, 81 Wis. 326; *Kelly v. Chicago*, 62 Ill. 279. Equity will not interfere in such a case as this where it is evident that there was no bad faith and it appears that the accepted bid is really the lowest and most advantageous. A reasonable discretion is vested in the county board to determine these things. *People ex rel. Belden v. Contracting Board*, 27 N. Y. 378; *East River G. L. Co. v. Donnelly*, 93 N. Y. 557; *Kelly v. Chicago*, 62 Ill. 283.

BARDEEN, J. The defendant county was proceeding to erect its asylum under and by virtue of the authority conferred upon it by secs. 603, 604, Stats. 1898. Sec. 604 provides that, before proceeding to the construction of such buildings, the county shall prepare plans and specifications thereof, which shall be submitted to, and approved by, the board of control. After such approval, the county board may adopt the same "and proceed to contract for the construction of said buildings with the *lowest bidder or bidders* for all the work and material required therefor." The complaint alleges and the answer admits that, with reference to the heating plant for said asylum, the plaintiff *Mueller* was the lowest bidder, and that the county had let the contract therefor to the defendant *Hobbs*, whose bid was $3 in excess of *Mueller's*. One reason urged by the defendants in justification of their acts is that the law vested the committee

with a discretion in the matter, and that they had a right to determine which bid was most advantageous to the county, and that the courts have no right to question the reasonable exercise of that discretion. Undoubtedly, if their premise is correct, the rule suggested is the law of the land. When the powers conferred necessarily involve the exercise of discretion, the courts will not question its exercise except for an abuse equivalent to fraud. *People ex rel. Belden v. Contracting Board*, 27 N. Y. 378. See *East River G. L. Co. v. Donnelly*, 93 N. Y. 557. Many cases might be cited to this proposition. But does the statute invest the county authorities with the exercise of discretion? It says the board may adopt plans and "proceed to contract for the construction of said buildings with the lowest bidder or bidders for all the work and material required therefor." The language is plain, simple, and easily understood. It is not open to construction. The duty of the board is ministerial and not judicial. It requires no exercise of judgment or discretion to determine which is the lowest bid. It is a mere matter of computation. The law says they may contract with the lowest bidder. Not with the bidder whose bid, in their judgment, is the most advantageous to the county, but with the person who will bid to do the work for the least money. The situation is entirely unlike the cases cited by defendants, where the authority conferred was to let the contract to the lowest bidder "giving adequate security," or to the "lowest responsible bidder." In such cases the courts very properly hold that the power conferred implies the exercise of discretion, which will not be interfered with. In this case, however, the statute invests the board with a public duty, and points out the manner of its exercise. It can be legally exercised in no other way. The importance of strict adherence to, and literal compliance with, the mandates of the statute conferring the authority has been announced and reiterated by this court in no uncertain terms. It is entirely

unnecessary to repeat what has been said, and we will content ourselves with reference to the cases. *Wells v. Burnham*, 20 Wis. 112; *Ricketson v. Milwaukee*, 105 Wis. 591.

It will be observed that one of the reasons given for the strict enforcement of this rule is the prevention of favoritism and arbitrary action on the part of municipal authorities. This case affords a fair example of the dangers to be encountered by any relaxation from the strictness of this rule. *Mueller* had gone to the trouble and expense of traveling from Milwaukee to Eau Claire; had no doubt spent some time in examining the plans; had submitted his bid and made his deposit, as required, assuming, as he had a right to, that the lowest bidder would receive the contract. Within the principle stated, he was clearly entitled to the contract, his bid being the lowest. But the committee thought otherwise. They believed, honestly no doubt, that they might survey the whole situation and accept the bid that was most to the advantage of the county. As they have set out in their answer, they believed that exigencies might arise when it would be more convenient for them and cheaper for the county to deal with a contractor who lived in their midst and with whose business methods they were familiar. The difference in the bids was but a trifle, and the loss to the county might be made up many times, during the progress of the work, by having the contractor at hand. This contention is specious, but fatal to open bidding and destructive of the very purpose of the statute. It opens the door to favoritism, stifles competition in bidding, and leads to abuses without limit. It makes no difference that the amount involved is small or that the injury to the county is insignificant. The moment you depart from the line which has been blazed, you strike a very wilderness. Each municipal body would become a law unto itself. Consideration of local pride, arguments of convenience, friendship to bidders, all would unite to the prejudice

of one and the benefit of another. A committee without any rudder but its own sweet will, or, as argued here, its reasonable discretion in such matters, might be guilty of many abuses, and yet find justification on the very grounds set up in the answer in this case. But the superlative objection may be found in its influence upon the bidding. If the considerations suggested were allowed to prevail, outside bidders would find little encouragement to compete against local contractors, and the scheme of competition by bidding would be reduced to the level of mere negotiation. We therefore have no hesitancy in saying that the answer presents no sufficient defense.

The next question suggested is that, under the facts presented, the plaintiffs are not entitled to maintain this action. The presence of the contractor *Mueller* neither adds to nor detracts from the rights of his coplaintiffs. They sue as taxpayers to redress their own wrongs and those of the public. The fact that their ultimate pecuniary loss may be almost infinitesimal is not controlling. Their right to sue is not based alone upon a direct loss to them in the ultimate winding up of the transaction attacked. It rests rather upon the fact that an illegal contract has been entered into which will require a large amount of the taxpayers' money to satisfy. In other words, a debt has been created without warrant of law, and the money of the taxpayer is about to be used for its liquidation. Every taxpayer, great or small, has an interest in the disposition of county funds. Courts will not stop to balance differences or enter into computations to ascertain just how much the taxpayer will be likely to suffer, and then grant or deny relief according as they find his loss will be great or small. The principle stated in the recent case of *Kyes v. St. Croix Co.*, *ante*, p. 136, is applicable to, and governing in, this case; or, as is said in another case: "The private person so suing must show something more than a mere speculative or threatened

wrong or illegal act. He must show an active or threatened invasion or destruction of a distinct right belonging to himself or to the body of citizens for whom he sues." *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493. When this is shown, and it appears that a burden of debt is about to be illegally cast upon the county, the taxpayer's right to sue is recognized, and the court will not stop to inquire whether his individual loss is great or small. In contemplation of a court of equity, the loss to the county would be the entire amount of the contract price to be paid on the illegal contract, and not the difference between the valid and void contracts. If courts should stop to balance up such differences, cases would multiply without end, and each court would be a law unto itself.

A clause in the contract provides that, "Should said committee, at any time during the progress of the work of said heating plant, require any alteration, addition, or omission from the work specified, the same shall be done, and shall not affect or avoid this contract, and will be added to, or deducted from, the contract price, as may be, by a fair and reasonable valuation." Upon this the plaintiffs attempt to found an argument that it is an evasion of the statute, which says that the board shall prepare *complete* plans and specifications for the work. This "smacks of overrefinement." It is the clause usually put in building contracts to enable the owner to make changes, correct mistakes, or cause additions or omissions in order to make the building more truly conform to its intended use. It must be construed reasonably, and, so construed, would, of course, limit the changes to such as would not substantially alter the character of the building or increase its cost to an unreasonable amount. See *Kretschmar v. Bruss, post*, p. 396.

By the Court.— The order appealed from is reversed, and the cause is remanded with directions to sustain the demurrer to the answer, and for further proceedings according to law.

ELLIS, Appellant, vs. SOUTHWESTERN LAND COMPANY, imp., Respondent.

108 313
112 410
112 412
112 455

November 16 — December 7, 1900.

Principal and surety: Fraudulent conveyance: Equity.

A surety who has not paid the debt of his principal cannot maintain an action in equity to have a fraudulent conveyance by the principal set aside and the property so conveyed subjected to the payment of the debt.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

A demurrer was sustained to the plaintiff's complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The alleged cause of action may be briefly stated as follows: The plaintiff, *H. C. Ellis*, executed an undertaking to pay costs on an appeal and damages, if the judgment was affirmed, in an action wherein one Whereatt was plaintiff and the defendant J. F. Ellis was defendant. The condition of the undertaking was broken, and a judgment, yet unpaid, was entered thereon against plaintiff. Plaintiff is not indebted to J. F. Ellis, who is insolvent, and garnishment proceedings are now pending to enforce payment against plaintiff. On September 1, 1893, J. F. Ellis made a conveyance of all or nearly all of his available property to the defendant *Southwestern Land Company.* This conveyance is alleged to have been in fraud of creditors and in fraud of the rights of plaintiff. No proceedings have been taken to collect the judgment from J. F. Ellis, or to follow the property so fraudulently conveyed. Plaintiff is unable to pay the judgment at this time, and in this action seeks to have such conveyance set aside, to have a receiver appointed, and to have the grantee therein account for the property it received, and out of the proceeds to have the

judgment in question paid. The appeal is from the order sustaining the demurrer.

W. F. Bailey, for the appellant.

For the respondent there was a brief by *Wickham & Farr*, and oral argument by *James Wickham*.

BARDEEN, J. For many years the law has been settled in this state that a creditor is not entitled to maintain an action in equity to set aside a fraudulent conveyance until he has exhausted his remedy at law by obtaining a judgment against his debtor, issuing execution thereon, and having it returned unsatisfied. *Montague v. Horton*, 12 Wis. 599; *Gilbert v. Stockman*, 81 Wis. 602; *Weber v. Weber*, 90 Wis. 467; *French L. Co. v. Theriault*, 107 Wis. 627. As between the parties and their representatives, a conveyance in fraud of creditors is valid and binding. One of the first requirements that must exist to enable a creditor to attack a fraudulent conveyance is that his demand should be legally enforceable. 14 Am. & Eng. Ency. of Law (2d ed.), 281. The plaintiff is a mere surety. He has paid no part of the judgment against him. He may never do so. It may be collected from the principal, or from some one of the other parties who signed the undertaking. At law he would have no standing in court until he had paid the debt. *Taylor v. Coon*, 79 Wis. 76; *Barth v. Graf*, 101 Wis. 27.

But it is said plaintiff may maintain this action upon the principle stated in the case of *Dobie v. Fidelity & C. Co.* 95 Wis. 540. That case holds that a surety may maintain an action in equity against his principal to compel him to exonerate him from liability by discharging the debt for which both are liable, without first paying it himself. But that is not this case. The surety here is attempting to go much farther. He is seeking to attack a conveyance which he could not attack, under the circumstances stated, even if he was a creditor. His rights as surety in such a case are no

greater than those of creditors. A creditor could not proceed until he had exhausted his legal remedies. The conveyance being good as between the parties, it can only be attacked by creditors of the fraudulent grantor who have been defrauded, and then only under the circumstances already pointed out. The rule that a surety who has not paid the debt cannot bring a suit to have a fraudulent conveyance of property made by his principal set aside is laid down in the following cases: *Barnes v. Sammons*, 128 Ind. 596; *Williams v. Tipton*, 5 Humph. 66. See *Mugge v. Ewing*, 54 Ill. 236; *Nash v. Burchard*, 87 Mich. 85. In Tennessee, under a statute passed since *Williams v. Tipton* was decided, a surety may now maintain such an action. *Greene v. Starnes*, 1 Heisk. 582.

The only case plaintiff's counsel was able to find which is claimed to support his position is a memorandum decision found in *Stump v. Rogers*, 1 Ohio, 242, the syllabus of which reads as follows: "Security may proceed against principal in equity to have his estate subjected to the payment of the debt without making payment himself before commencing his suit." The statement of the case shows that the action was brought by a surety to set aside an alleged fraudulent conveyance, but there is no discussion of the right in the opinion, and the decision, tested by the syllabus, is of little weight.

The true principle seems to be that a surety paying the debt of his principal is subrogated to the rights of his creditor. Until such payment he has no right enforceable against third parties. He may compel his principal to exonerate him from liability by applying his property to payment of the debt. But, when the principal has put his property beyond his power to use it for that purpose, the surety must be content to follow it along the same lines that a creditor may follow it.

By the Court.—The order appealed from is affirmed.

108 316
109 58

108 316
112 285

108 316
117 562

THE STATE EX REL. GIROUX, Appellant, vs. LIEN, City Clerk, Respondent.

November 17 — December 7, 1900.

Taxation: Board of review: Presumption as to correctness of assessment: Certiorari: *Quashing writ for insufficiency.*

1. An assessment, challenged before a board of review, needs no evidence to support it in the first instance, but must stand unless shown to be incorrect by reasonably clear and unambiguous evidence.
2. Where a writ of *certiorari* discloses the absence of any facts which could have justified other action than that taken by the board whose proceedings are being reviewed, the writ is properly quashed on motion.

APPEAL from a judgment of the circuit court for Jackson county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

In the assessment roll for 1899 relator was assessed, "Moneys, accounts, bonds, credits, notes, and mortgages, $3,000." Upon the meeting of the board of review in July of that year he appeared before the board, objected to such assessment, and requested that the same be stricken from the assessment roll, and testified orally, mainly in response to questions by the city attorney. His testimony was to the effect that he did not have a mortgage on the Dunnigan farm; that he did not on the 1st of May, 1899, have any money of any kind in the banks or elsewhere; that he did on the 1st of May hold some real estate, but had since given it away to his daughter; that he took an assignment from one Leslie Green, but that the purchase was for Thomas Dunnigan, who repaid him the money; that he did not take a mortgage from John Anderson, but took a deed on his farm, and did not know whether he had a contract against it, nor who paid the taxes on it; that Sylvester Byrns did not owe him $35; that he did take a land contract from one John L. Moens; that he had done the business of his daugh-

ter, Mrs. White, for the last ten years, and holds a power of attorney from her; that he did not make investments for her as her agent. As to a multitude of other questions with reference to specific securities or conveyances found in the office of the register of deeds, he answered with practical uniformity, "I do not know." A property statement from *Giroux* to the assessor was present and exhibited before the board, but whether sworn to, or what were its contents, is not made to appear. The assessor submitted to the board a statement or list of conveyances and securities to *Giroux* and to his daughter Jenny White, which appeared in the registry of deeds, but whether such list constituted the basis of the assessment was not stated. The board of review refused to modify or strike out said assessment, and approved the same. To that decision the relator sued out a writ of *certiorari*, which sets forth the facts above stated, including said evidence, with the assertion that no other evidence was offered before the board. Upon motion, before return, the court entered an order or judgment quashing and dismissing said writ, from which the relator appeals.

W. C. Donovan, for the appellant, contended, *inter alia*, that where the evidence appears uncontradicted and nothing appears by the record impairing its credibility it is the plain duty of the board to correct the assessed valuation of the property accordingly, and their failure so to do constitutes a clear violation of the law which is subject to be corrected by *certiorari*. *Milwaukee I. Co. v. Schubel*, 29 Wis. 444; *Fond du Lac W. Co. v. Fond du Lac*, 82 Wis. 322; *Brown v. Oneida Co.* 103 Wis. 149; *State ex rel. Heller v. Lawler*, 103 Wis. 460.

Carl C. Pope, for the respondent.

DODGE, J. The assessor's valuation, "Moneys, accounts, bonds, credits, notes, and mortgages, $3,000," stood before the board of review as *prima facie* correct, with no duty or authority in that board to change it, except on evidence.

Sec. 1061, Stats. 1898; *Shove v. Manitowoc*, 57 Wis. 5; *State ex rel. Smith v. Gaylord*, 73 Wis. 306; *State ex rel. Heller v. Lawler*, 103 Wis. 460; *State ex rel. Davis & S. L. Co. v. Pors*, 107 Wis. 420. Relator, as a witness, denied ownership of any "money in banks or elsewhere on May 1st," and denied ownership of one or two specific securities as to which he was interrogated. He, however, did not testify that he was not the owner of credits to the amount of $3,000 in excess of his debts, nor did he offer any other evidence tending to deny such fact. In that situation the board of review had but one course to pursue, namely, to refuse to change the assessment roll. Relator's position seems to be that because, by objection, he challenged the correctness of that roll, the same should have been changed, unless supported by evidence; for he asserts that certain alleged securities in a list produced from the county registry were not shown to evidence debts to him, and some of them were shown not to do so, and thereupon urges that the assessment of $3,000 is not supported. This contention is for the converse of the true rule governing the conduct of boards of review, as declared by the above-cited authorities. The assessment needs no support by evidence in the first instance, but must stand, unless shown to be incorrect by reasonably direct and unambiguous evidence. None such was offered.

Since the writ itself discloses the absence of any facts which could have justified other action than that which the board took, it was properly quashed when, by motion, such insufficiency was brought to the attention of the circuit court. Harris, Certiorari, § 54; *State ex rel. Clancy v. McGovern*, 100 Wis. 666, 671; *State ex rel. Heller v. Lawler*, 103 Wis. 467.

By the Court.— Judgment affirmed.

WANZER, Appellant, vs. CHIPPEWA VALLEY ELECTRIC RAILROAD COMPANY, Respondent.

108 319
112 *230

November 17 — December 7, 1900.

Street railways: Injury to passenger: Negligence and contributory negligence: Degree of care required: Proximate cause: Special verdict: Inconsistency: Modification: Court and jury.

1. In an action against a street railway company for personal injuries alleged to have been caused by negligence in the operation of the car in which plaintiff was riding, a finding of the special verdict that a prudent person engaged in the business of the defendant, who exercised the utmost care and forethought for the safety of passengers, would not have foreseen, in the light of attending circumstances, that an injury to plaintiff would be the natural and probable result of operating the car as it was operated, is *held* to be in direct conflict with a finding that the defendant's failure to exercise the highest degree of skill and care which a careful and vigilant man would observe in like circumstances was the proximate cause of plaintiff's injuries; and the verdict is therefore insufficient to support a judgment in defendant's favor.
2. There having been several passengers in the car, to all of whom the company owed the same duty of care and forethought, the question which should have been submitted to the jury was not whether an injury *to plaintiff* only, but whether an injury *to any of such passengers*, should have been foreseen as the natural and probable result of operating the car as it was operated.
3. Upon the evidence — which tended to show, among other things, that a little after 8 o'clock on a dark, stormy evening in June, while the car was running about seven miles per hour, the motorman received a signal to stop; that he immediately sounded the gong and shut off the current; that at about the same time he noticed a load of hay on the track about seventy-five or eighty feet ahead of him; that he immediately set his brake; that when about twenty feet from the load he discovered he could not stop the car with the brake, and immediately reversed the current, but the circuit breaker instantly blew out, and the car struck the load; and that the plaintiff, being frightened by the flash and explosion, followed by a crash and rattle of breaking glass, ran out, jumped off the steps while the car was still in motion, and was injured,— it is *held* that it was not error for the trial court to refuse to mod-

ify findings in the special verdict to the effect that defendant's failure to exercise the highest degree of skill and care which a careful and vigilant man would exercise was the proximate cause of the injury; that the car could have been stopped within seventy-five feet by the use of all appliances with which it was equipped, and that the motorman, by the exercise of the utmost care in performing his duty, could have avoided the collision after he observed the wagon on the track; and it was also a question for the jury whether, in view of the darkness and the liability of teams to be upon the track, the speed of the car was negligently high.

4. If the collision was caused by the motorman's negligence, and the plaintiff did not attempt to leave the car until after it occurred, she would not be precluded from a recovery by the mere fact that, being nervous and frightened, she unwisely attempted to escape instead of remaining quietly in the car with the other passengers, who were unhurt.

5. For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business. Questions for a special verdict which, in connection with the instructions, fixed the standard of care as "the highest degree of skill and care which a careful and vigilant man would observe, in like circumstances, in the management of such business," "the utmost care and forethought for the safety of passengers," etc., are *held* erroneous.

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Reversed.*

For the appellant there was a brief by *W. C. Donovan*, attorney, and *V. W. James*, of counsel, and oral argument by *Mr. Donovan.* They argued, among other things, that it is sufficient to charge the defendant if its acts were of such a character that in the exercise of proper care it might have foreseen that injury to others might probably result therefrom, even though it could not anticipate the precise injury which did happen to plaintiff would happen to her. *Brown v. C., M. & St. P. R. Co.* 54 Wis. 351; *Christianson v. C., St. P., M. & O. R. Co.* 67 Minn. 94, and cases cited; *Gilson v. Delaware & H. C. Co.* 36 Am. St. Rep. 802, and

cases in note; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 358; *Stevens v. Dudley*, 56 Vt. 158, 166; *Hill v. Winsor*, 118 Mass. 251; *Higgins v. Dewey*, 107 Mass. 494.

For the respondent there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *R. P. Wilcox*. They contended, *inter alia*, that in order that a negligent act may be held to be the proximate cause of the injuries inflicted, it must have been such an act and so done that the defendant, as a prudent person, in the light of all the attending circumstances, would reasonably have anticipated that an injury to the plaintiff might naturally and probably result. *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 164; *McGowan v. C. & N. W. R. Co.* 91 Wis. 147, 156, 157; *Huber v. La Crosse City R. Co.* 92 Wis. 636; *Sheridan v. Bigelow*, 93 Wis. 426, 428; *Pier v. C., M. & St. P. R. Co.* 94 Wis. 357; *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 285, 286.

CASSODAY, C. J. This is an action to recover damages for personal injuries sustained by the plaintiff while riding as a passenger for hire on the defendant's electric car, by reason of its running into a load of hay, at ten minutes after 8 o'clock on the evening of June 12, 1899.

Issue being joined and trial had, the jury returned a special verdict to the effect (1) that the defendant did, in the manner in which it operated the car in which the plaintiff was a passenger at the time of receiving her injuries, fail to exercise the highest degree of skill and care which a careful and vigilant man would observe in like circumstances in the management of such business; (2) that such failure to exercise such skill and care was the proximate cause of the plaintiff's injuries; (2½) that a prudent person engaged in the business of the defendant, who exercised the utmost care and forethought for the safety of passengers, would not have foreseen, in the light of the attending circumstances, that an injury *to the plaintiff* would be the natural and probable re-

sult of operating the car as it was operated; (3) that the plaintiff was not guilty of any want of ordinary care which contributed to her injuries; (4) that the car in question could have been stopped, at the time and place where the accident occurred, by the use of all the appliances with which the car was equipped, inside of seventy-five feet; (4½) that McClellan's wagon proceeded northerly on the defendant's track at the time of the collision, about 175 feet; (5) that the motorman, Fox, by the exercise of the utmost care in performing his duty, could have avoided colliding with McClellan's wagon after he observed the same on the track; (6) that the defendant's conductor in charge of the car did not exercise that care which a careful and vigilant man in the same business, under like circumstances, would have exercised to prevent the plaintiff from leaving the car; (7) that they assessed the plaintiff's damages at $1,575. Questions 2½, 4, 4½, and 6 were submitted at the request of the defendant.

Thereupon the plaintiff moved the court, upon the minutes of the judge and such verdict, to order judgment in favor of the plaintiff and against the defendant, or to strike from the verdict the answer to question 2½, or to change the negative answer to that question to an affirmative answer, and then order judgment thereon in favor of the plaintiff and against the defendant, which several motions of the plaintiff the court denied, and the plaintiff then and there excepted. Thereupon the defendant moved the court for judgment on the verdict in favor of the defendant and against the plaintiff, dismissing the complaint with costs, and also to strike out the affirmative answer to question No. 2, as being a conclusion of law and erroneous, and insert in lieu thereof a negative answer, and for judgment thereon in favor of the defendant and against the plaintiff, dismissing the complaint with costs, and also to strike out the answers to questions Nos. 4 and 5, respectively, as not being sus-

tained by the evidence, and for judgment in favor of the defendant upon the verdict so modified, dismissing the complaint, which several motions of the defendant to change and modify the verdict were each and all denied by the court, and the defendant then and there excepted. Thereupon the court ordered that judgment be entered in favor of the defendant, dismissing the complaint, on the verdict so rendered, with costs to be taxed against the plaintiff, to which ruling the plaintiff excepted.

1. The first question presented by the record for consideration is whether the judgment in favor of the defendant is supported by the findings of the jury. As indicated in the statement of facts, all the findings of the jury are in favor of the plaintiff, except the answer to question No. 2½; and that answer is in direct conflict with the answer of the jury, under the charge of the court, to question No. 2, as to the proximate cause of the plaintiff's injuries. Certainly the judgment is not supported by such conflicting findings upon a vital question in the case. *Haas v. C. & N. W. R. Co.* 41 Wis. 44; *Fick v. Mulholland*, 48 Wis. 310; *Selleck v. Griswold*, 49 Wis. 39; *Burns v. North Chicago R. M. Co.* 60 Wis. 541; *Goff v. C. R. & M. R. Co.* 86 Wis. 237; *Darcey v. Farmers' L. Co.* 87 Wis. 245; *S. C.* 91 Wis. 654.

2. Besides, there is another insurmountable objection to holding that the judgment for the defendant is supported by the findings of the jury; and that is that the answer of the jury to question No. 2½, upon which the defendant relies, does not embody the standard of care required of the defendant. There were several persons in the car besides the plaintiff. The defendant owed the same duty of care and forethought for the safety of all of them. If by the exercise of such care and forethought the defendant's employees, or any of them, in charge of the car, would have foreseen, in the light of the attending circumstances, that an injury to any of such passengers would be the natural and probable

result of operating the car as it was operated, and failed to do what they could to prevent such injury, then the defendant would be guilty of actionable negligence, whereas the question submitted and answered limited the defendant's care and forethought to the plaintiff alone.

3. Undoubtedly a trial court may change and modify particular findings of the jury in a special verdict so as to conform to the admitted facts or the undisputed evidence. *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 243, 257; *Keller v. Schmidt*, 104 Wis. 602. The question recurs whether, upon the undisputed evidence, the court should have granted the defendant's motion to change and modify the answers of the jury to questions 2, 4, and 5, as indicated in the statement of facts.

The defendant's line of street railway runs from a point in Eau Claire to Chippewa Falls. After leaving the corner of Barstow street and Grand avenue, in Eau Claire, it passes, among other streets, eastward on Madison street to Putnam street, and thence north on Putnam street across Birch street and beyond. About 8 o'clock on the evening in question the plaintiff took passage on the defendant's car at the corner of Barstow street and Grand avenue for Birch street, where she informed the conductor that she desired to get off. The accident happened on Putnam street, and a short distance south of Birch street. Four hundred and twenty-two feet north of Madison street there is a street coming into Putnam street from a westerly direction,—known as "Fay Street,"—which is seventy-three feet in width. From Fay street to Birch street is 427 feet. A short time before the car in question reached Fay street from the south, the witness McClellan drove out of Fay street with a load of hay onto Putnam street, and from thence north on that street, in such a way that the east wheels of his wagon were between the rails of the defendant's track. The jury find that McClellan's wagon proceeded northerly on the de-

fendant's track at the time of the collision for a distance of 175 feet, and that finding is not challenged by either party.

The motorman on the car in question testified to the effect that after he turned the corner of Madison and Putnam streets he rang the gong until he reached Fay street; that when he got in the middle of the block between Fay and Birch streets he got a signal — one tap of the bell — from the conductor to stop at the next corner; that he answered such signal with one tap of the gong; that soon after that he noticed a team of horses on his left, and looked to see if they were clear in the road; that as he turned his head back and threw off his power he noticed a load of hay on the track in front of him, and immediately set his brake, and when he saw that he could not stop the car with the brake he reversed his car, and in doing so the circuit breaker blew out, and he hit the load of hay; that, as near as he could judge, he was about twenty feet from the load of hay when he reversed his circuit; that instantly after he reversed the car the circuit breaker blew out; that he only got two points of the current on the reverse; that when the car struck the load of hay the front window of the vestibule was broken, and the oil headlight in front was broken; that the car might have gone eight or ten feet ahead after striking the load; that he did not notice much of any jar; that he remained standing in his place, and the collision had no effect on him; that, as near as he could judge, the load of hay was about seventy-five or eighty feet ahead of him when he first saw it; that there was a large storm coming up and it was dark at the time; that at the time he first saw the load of hay his car was running about seven miles an hour; that he turned the current off just about the same time that he saw the load of hay, for the purpose of getting ready to make his stop at Birch street; that he had struck his gong three or four times for Birch street, and was hitting it at the time he saw the load of hay; that at the time the car

stopped it was about ten or twelve feet from the south side of Birch street crossing; that the lights were burning in the car at that time, and had been all the time after the car got onto Putnam street; that there were eight incandescent lights inside the car, and an incandescent headlight on both ends of the car, and an oil headlight on the outside of the front end of the car; that he thought he might, by using all the appliances, have stopped the car, at the rate it was going, in a distance of from 100 to 125 feet. The motorman appears to have been a person of considerable experience, and the car was apparently properly equipped.

The plaintiff, who was at the time twenty-eight years of age, testified to the effect that the car was moving along at an ordinary rate of speed, when there was a flash, which seemed like an explosion and as though the car was filled with fire; that following such flash and explosion there was a crash, and the glass began to rattle and break, and that it seemed to her as though the car was going to pieces; that she remained in her seat until after the glass began to break, and then, being terribly frightened, she tried to escape from the car, and ran and jumped or stepped off the rear platform while the car was still moving slowly.

The conductor of the car, who appears to have been a man of considerable experience, was standing on the rear platform when the circuit breaker blew out, and testified to the effect that after the circuit breaker blew out the plaintiff came to the rear door of the car; that he told her to wait until the car stopped; that she was at that time on the rear platform; that she then jumped straight off from the step; that her feet struck first, and then she fell; that he jumped off the car right after her; that the crash or sound of breaking glass occurred just as he left the car; that the plaintiff was then on the ground. He also corroborated the motorman as to the giving of signals, the sounding of the gong, and the darkness at the time.

The testimony is voluminous. Enough has been given to indicate the general nature of the questions presented. It will be observed that as the motorman turned his head back from the passing team he threw off his power, and then noticed the load of hay on the track, seventy-five or eighty feet in front of him, but that he did not reverse his current until he was about twenty feet from the load of hay. We cannot say, as a matter of law, that the court should have granted the defendant's motion to change the answers to the three questions mentioned,—especially the second and fifth. The darkness of the night, caused by the coming storm and the trees along the street, and the liability of teams to be upon the track, made it a proper question for the jury to determine whether, under the circumstances, the speed of the car was negligently high. *Heath v. Stewart*, 90 Wis. 418.

4. It appears that the other persons in the car remained until it stopped, and were uninjured. Manifestly, if the plaintiff had so remained in the car she would not have been injured. But the flash, explosion, and collision were well calculated to shock a nervous person, as the plaintiff appears to have been. Such persons are liable and expected to ride upon street cars, as well as to travel upon the public highways. *Oliver v. La Valle*, 36 Wis. 597; *Stewart v. Ripon*, 38 Wis. 584, 591. We assume that the reversal of the car and the consequent blowing out of the circuit breaker was not of itself actionable negligence. If that is so, then, if the plaintiff actually started out of the car and was jumping or stepping therefrom before the collision and while the car was in motion, as testified to by the conductor, the collision was not the proximate cause of her injuries. But if the collision was caused by reason of the motorman's negligence, and she remained in her seat until after the collision, as detailed in her evidence, then she would not be precluded from a recovery by the mere fact that she unwisely at-

tempted to escape from the car instead of remaining quietly in the car. In other words, she is not precluded from a recovery merely for failing to choose what, after the result was ascertained, might seem to have been the best means of escape. *Bishop v. Belle City St. R. Co.* 92 Wis. 145; *Wynn v. C. P., N. & E. R. R. Co.* 133 N. Y. 575. Besides, the jury found that the plaintiff was free from contributory negligence, and that finding is unchallenged.

5. But we cannot hold, as a matter of law, that the plaintiff's motion to set aside the answer of the jury to question No. 2½, and then order judgment in favor of the plaintiff upon the other findings of the jury, should have been granted. In answer to some of the questions submitted, the jury required the defendant to exercise a higher degree of care than the law imposed. Thus, in answer to the first question the jury found that the defendant failed "to exercise the highest degree of skill and care which a careful and vigilant man would observe, in like circumstances, in the management of such business." The charge of the court authorized the jury to find that the failure to exercise such a degree of care in respect *to the plaintiff* was the proximate cause of her injuries. So in answer to question No. 2½ the jury found that the defendant did not exercise "the utmost care and forethought for the safety of passengers," etc. The fifth question submitted is subject to a similar criticism. So the charge requiring the defendant "to operate its cars with the highest degree of skill and care commensurate with or proportionate to the *possibility* of injury to its passengers" is subject to the same criticism. So by the charge the defendant was held "bound to exert the utmost care and prudence in carrying its passengers." Undoubtedly there are adjudications which give support to such expressions in regard to such carriers, but in our judgment they are misleading if not erroneous. A recent text writer has stated, as the clear result of the best adjudications on the subject, the rule thus: "For the safety of their passengers, common carriers are

required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business." 1 Fetter, Carriers of Passengers, § 8, and cases there cited. Among the adjudications which fairly support such proposition are the following: *Libby v. M. C. R. Co.* 85 Me. 34, 44; *Murray v. L. V. R. Co.* 66 Conn. 512; *Chicago & A. R. Co. v. Byrum*, 153 Ill. 131, 134; *Keller v. H., M. & F. P. R. Co.* 149 Pa. St. 65; *Fredericks v. N. C. R. Co.* 157 Pa. St. 103; *Philadelphia, W. & B. R. Co. v. Anderson*, 72 Md. 519, 526, 527; *Bowen v. N. Y. C. R. Co.* 18 N. Y. 408. The rule stated seems to be reasonable and just, both to the passenger and the carrier.

The wording of some of the questions submitted, and the charge to the jury, may be the subject of criticism, but that will probably be obviated upon a new trial.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

GOODRICH, Appellant, vs. CHIPPEWA VALLEY ELECTRIC RAILROAD COMPANY, Respondent.

November 17 — December 7, 1900.

Street railways: Injury to motorman at railway crossing: Contributory negligence.

A motorman employed by a street railway company was directed by the company to run his car across the track of a steam railway without stopping, and assured that no accident was liable to occur thereby. He did not know that the steam-railway track was frequently used, and in crossing it without looking or listening was run into and injured by the cars thereon. In an action against the street railway company it is *held* that he was guilty of contributory negligence precluding a recovery.

APPEAL from an order of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries. The complaint alleges, in substance, the corporate character of the defendant, and the fact that it was engaged in operating an electric street railroad in the city of Eau Claire upon a highway of said city called Price street, crossing at right angles another street called Mill street, upon which last-named street there is situated a railroad track owned by the Chicago, Milwaukee & St. Paul Railway Company, over which trains and cars propelled by steam engines were operated; that the fact that said steam-railway track was frequently used by engines and trains was well known to the defendant company, but not known to the plaintiff until after the accident complained of; that the plaintiff was employed prior to February 17, 1899, by the defendant as its servant in the active operation of its railroad, and that prior to the happening of the accident he was required by the defendant to act as a motorman on one of its cars, and to operate said car upon Price street over and across said crossing, and at the time of the said accident was so engaged; that before the happening of said accident it was the duty of the defendant to allow and permit the plaintiff to stop his said car before attempting to cross said steam-railroad track, and to allow the plaintiff to stop and look and listen for the approach of trains and engines on said track before crossing the same, and to supply said car with suitable and adequate brakes, and to keep and maintain its railroad track in proper condition and repair, so that said car might be safely operated over the same; that on the 17th day of February, 1899, and prior thereto, the defendant knowingly and negligently neglected to perform its duties to said plaintiff in the following particulars: (1) that it refused to permit the plaintiff to stop his said car before attempting to cross said steam-railway track, and permit him to stop and look and listen for

the approach of trains thereon, or to warn him that trains were liable to be run thereon, but rather made and directed him to run said car across said track without stopping, and without opportunity to look and listen for the approach of trains, and assured him that engines and trains were not so operated on said track that a collision between his car and such trains was liable to occur; (2) that it negligently omitted to equip said car with adequate and sufficient brakes with which it could be stopped within a reasonable time, so as to render the operation of said car reasonably safe; (3) that it negligently failed to construct and maintain its railroad track at said crossing in a reasonably safe condition, in that it constructed its said track below the surface of the street to such an extent that ice naturally accumulated on said track, so that the wheels of cars passing over the same would naturally slip to such an extent that the car could not be controlled by the motorman in charge thereof.

The complaint further alleged that on the 17th day of February, 1899, the plaintiff, as the servant and employee of the defendant, was operating one of the defendant's cars upon said Price street, and attempting to cross said steam-railway track as required by the defendant, and that while so attempting three of the cars of the Chicago, Milwaukee & St. Paul Railway Company, propelled by one of its engines, were being run over its steam-railway track across said Price street, and that the plaintiff was unaware of the coming of said cars, and did not know that the same were about to pass over said Price street; that when the plaintiff's car was in the act of crossing the said steam-railway track the said cars of the said Chicago, Milwaukee & St. Paul Railway Company ran violently against said car, throwing the same from the track, and seriously injured the plaintiff, and incapacitated him from labor for a long time, and compelled him to expend large sums for medical and surgical attendance; that at the time of said accident the plaintiff,

as defendant well knew, was unaware of the inadequacy of the brakes on said car and of the defective and dangerous condition of the defendant's track, and did not know that any train was liable to be run over the track of said steam-railway company without notice or warning of its approach; and that the plaintiff, at the time of said accident, was exercising due care, and that said accident was wholly caused by the negligence of the defendant, as hereinbefore set forth, and by its refusal to permit the plaintiff to stop said car before attempting to cross said railroad track, and to look and listen for the approach of trains thereon, and by the inadequate, dangerous, and defective condition of the brakes on said car and of its said car track, as hereinbefore set forth. Judgment for damages in the sum of $5,000 was demanded.

A general demurrer to this complaint was sustained, and the plaintiff appeals.

V. W. James, for the appellant.

For the respondent there was a brief by *Frawley, Bundy & Wilcox*, and oral argument by *R. P. Wilcox*.

WINSLOW, J. It appears by the complaint that the plaintiff was a motorman on one of defendant's street cars (presumably an adult in full possession of his faculties); that he was directed by the defendant to run his car across the track of a steam-railway company without stopping, and assured that no accident was liable to occur thereby; that he did as directed, and was run into by cars being operated on the steam-railway track. There is no allegation that the steam-railway track was apparently unused, but it is alleged that the plaintiff did not know that it was frequently used. Upon these facts it is quite plain that the plaintiff cannot recover. The steam-railway track must have been in plain sight. It was itself a danger signal. *McKinney v. C. & N. W. R. Co.* 87 Wis. 282. It is just as much a signal of danger to the motorman of a street car as to the ordinary traveler. In crossing it without look-

ing or listening,— as it must be necessarily inferred that he did from the statements of the complaint,— the plaintiff was plainly guilty of contributory negligence. The fact that he was ordered to cross without stopping, and assured that there was no liability of accident, is no excuse to an employee of full age and capacity, who can appreciate the danger as fully as his employer. *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376.

It is true that the complaint alleges that the brakes were defective and the track improperly constructed, but neither of these facts appears by the complaint to have caused or contributed to the happening of the accident.

By the Court.— Order affirmed.

BOLIN, Administrator, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

November 17 — December 7, 1900.

108 333
108 264
f108 601
108 333
109 389

108 333
110 [1]159
110 [2]330
58 LRA 622

108 333
116 [2]646

Negligence: Contributory negligence: Comparative negligence: Wilful injury: Railroads: Driving trespasser from moving train.

1. In an action to recover damages claimed to have been caused by actionable negligence of the defendant, contributory negligence of the plaintiff, however slight, precludes his recovering damages, notwithstanding negligence of the defendant, however great, contributed thereto.
2. If a person injure another, either actually or constructively intending to do so, the injury is not attributable strictly to negligence, but to that degree of misconduct called wilful misconduct in the law, which this court has classed as gross negligence, though it has no element of inadvertence, a necessary element of negligence.
3. If an injury be wilfully inflicted within the meaning of the rule last stated, contributory negligence on the part of the injured person will not preclude his recovering damages therefor; neither will the fact that he was, at the instant of receiving such injury, a wilful trespasser upon the property of the person guilty of the wilful act.

4. A railway company is not obliged under all circumstances to stop its train before requiring a wilful trespasser thereon to cease his unlawful conduct.

5. If a railway train be not going at a dangerous rate of speed for a trespasser thereon to leave it, having regard to existing circumstances and the general custom of persons of his class in respect to boarding and leaving such trains while moving, and he cease the trespass by jumping from the train pursuant to the command of a trainman unaccompanied by any act of such trainman reasonably calculated to cause such trespasser to lose his self-control, the circumstances will not tend to show intent on the part of such trainman to commit a wilful injury.

6. It is not sufficient to warrant a reasonable inference of that intent necessary to a wilful injury to show that the alleged guilty party ought reasonably to have anticipated that such a result was merely within reasonable probabilities, else mere want of ordinary care would have that effect. To warrant such inference the circumstances must be such that a man of ordinary intelligence would expect such an injury to occur.

7. If a trainman command a wilful trespasser, riding on the bumpers of a freight train moving at the rate of four or five miles an hour, and whom such trainman has reasonable ground to believe is skilled in jumping on and off trains under the existing circumstances, no means reasonably calculated to cause such trespasser to lose his self-control being used to enforce the command, an intention to injure such trespasser, necessary to a wilful injury, cannot reasonably be inferred therefrom.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. *Affirmed.*

Action to recover damages for the death of Christ Peterson, alleged to have been caused by the wrongful conduct of the servants of the defendant in charge of one of its trains, for which conduct it was claimed defendant was liable. The deceased and his brother started from a place called Foxboro to beat their way on trains to their homes near Black River Falls, Wisconsin, a distance of several hundred miles. After journeying about five days, riding sometimes on one train and sometimes on another, as they could secure an oppor-

tunity, and without paying any railroad fare, on some occasions riding by permission of the trainmen and on others secreting themselves upon the train, they arrived at the station of Chippewa Falls. From there they went to Eau Claire on a street car. On the night of December 10th, with other persons to the number of about ten, who were in the same business of beating their way upon railroad trains, they boarded an east-bound passenger train at the Eau Claire station, each of such persons secreting himself on the train as best he could, the deceased and his brother locating themselves on the front end of a mail car. At Rosedale station, some distance east of Eau Claire, they were all compelled to leave the train. From there the deceased and his brother walked on the track to Augusta, a station further east, at which place they boarded a freight car in which there were other persons who were beating their way. It was a stock car, and the men all went inside. When the train arrived at Fairchild, the car occupied as aforesaid was set out on a side track, whereupon the deceased and his brother and their associates left the car. The two Petersons, with one or more of the others mentioned, then went upon the depot platform and waited for an opportunity to again board the train when it was made up and ready to proceed east. While on the platform one of the men who accompanied the Peterson boys suggested that they should not all keep together, whereupon the Petersons went by themselves. They stepped down upon the ground upon the right-hand side of the train, and, just before or as it started to move east, they boarded it by taking hold of the grab irons that were on the ends of the cars and climbing up onto the bumpers, one securing a place on each car. When the train had proceeded a short distance and had not yet left the depot platform, the conductor walked along on the ground on the left-hand side of the train for the purpose of discovering and ridding his train of trespassers. The train was then moving about four miles an

hour. He discovered the Peterson boys located as aforesaid and commanded them in a sharp tone of voice and with some profane language, swinging his lantern between the cars at the same time, to jump off the train. They obeyed the command. The deceased went out on the grab irons first and jumped for the platform, and his brother followed. As the deceased struck the platform he slipped, or in some manner lost control of himself, and fell under the wheels of the moving car, and was so badly injured that he died a few days afterward. Some of the persons who were associated with the Peterson boys in the stock car had secreted themselves on the train before such boys were compelled to leave it, two of such persons being on the bumpers of the front end of the car forward of the Peterson boys. They observed the conductor or brakeman looking for trespassers and jumped off the train just before the Peterson boys left it. One of them testified on the trial, saying that the train was going three or four miles an hour, or four or five miles an hour, and that, after they were compelled to leave the train and as they were running along the side watching for an opportunity to get on again, they saw the Peterson boys jump off. A short time after the accident happened the survivor of the Peterson boys made a statement of the circumstances of the injury to his brother, to be taken down in writing. Such statement was to the effect that while they were on the bumpers of the train it started; that it had gone only a few rods when they were commanded to get off the train, the man saying, "Get off boys, God damn you, hurry up and get off." There was other evidence substantially all to the effect that the speed of the train when the Peterson boys jumped off was not more than four or five miles an hour, or such that a person could walk and keep up with it. There was undisputed evidence that the class of men who beat their way on railroad trains customarily jump on and off trains when they are moving at a greater speed

than four miles an hour; that when a train is going at such greater speed it is common for such class of men to get upon the bumpers of the cars, catch onto the truss rods, crawl upon the truck beams, and secrete themselves on the trains in other ways; that when such men are discovered they will, unless permitted to ride, customarily drop or jump off the train.

The jury rendered a special verdict, substantially as follows:

(1) The conductor ordered the deceased and his brother to leave the train, striking at them with the lantern which he carried in his hand.

(2) The conductor ordered the deceased and his brother from the train, accompanying the order with an oath.

(3) Because of the position the conductor was in when he ordered the deceased off the cars, the manner in which he was dressed, the fact that he had a lantern in his hands, the distance from him to the deceased, the words used by him, and all the circumstances, the deceased jumped from the car because of a reasonable apprehension of immediate physical force being used to eject him, the violently threatened force being sufficient to impress a reasonable person with the belief that there was imminent danger of its being employed.

(4) The circumstances existing at the time the deceased was compelled to leave the train were such as to imperil his personal safety.

(5) The train was moving at the rate of three or four miles an hour.

(6) The conductor exercised his authority of removing passengers from the train in an unreasonable, imprudent, and improper manner, and without proper regard to the safety of the deceased.

(7) The act of the conductor was the proximate cause of the injury to the deceased.

(8) The conductor was guilty of reckless or wanton conduct in compelling the deceased to leave the car under the circumstances.

(9) Such reckless or wanton conduct was the proximate cause of the injury.

(10) The conductor, under the circumstances, ought reasonably to have anticipated that his conduct would cause an injury to the Peterson boy.

(11) The Peterson boy was not guilty of any want of ordinary care which contributed directly to the accident.

(12) We assess the damages recoverable for the benefit of the estate at $5,000.

Upon motion of defendant the verdict was amended by striking out the affirmative answer to the eighth question, substituting a negative answer therefor, and upon the verdict so amended the defendant moved the court for judgment. The motion was granted and judgment was entered accordingly, from which plaintiff appealed.

For the appellant there was a brief by *W. H. Frawley*, attorney, and *W. F. Bailey*, of counsel, and oral argument by *Mr. Bailey*.

For the respondent there was a brief by *H. H. Hayden* and *Pierce Butler*, attorneys, and *Thomas Wilson*, of counsel, and oral argument by *Mr. Wilson*.

MARSHALL, J. The reasons urged by counsel for appellant for a reversal of the judgment appealed from may properly be reduced to the following: Plaintiff's cause of action depended upon whether the defendant's conductor was guilty of gross negligence as found by the jury in answer to the eighth question. With that fact established, the right to recover was complete regardless of whether plaintiff was or was not guilty of contributory negligence. Evidence was produced permitting of a reasonable inference in accordance with the answer to such eighth question, so that it was

error on the part of the trial court to treat such answer as erroneous and give judgment for defendant upon the ground that there was no evidence that brought the fact so found within reasonable probabilities.

The idea plainly contended for in the first proposition mentioned is that if a person be injured by the concurrence of two proximate causes, one want of ordinary care on the part of such person and one gross negligence on the part of another, legal damages result. To support that theory the learned counsel has drawn liberally from the adjudications of other courts, many of which have either followed fully or in part the doctrine of comparative negligence, which finds its most significant source in *Davies v. Mann*, 10 Mees. & W. 546, and has referred to adjudications of this court, which are made to appear consistent with such foreign adjudications. The doctrine referred to, so far as it permits a recovery of damages as the result of a negligent act to turn on a comparison of the negligence of the plaintiff with the negligence of the defendant, however great the latter may be, within the boundaries of negligence strictly so called, and however slight the former may be if it only pass the boundaries of want of ordinary care, is not now and never has been a part of the law of this state, though it is true there are many expressions here and there, in opinions in cases decided, where the term "negligence" has been used as descriptive of wrongful conduct that was beyond the scope of the term "negligence" as it is ordinarily understood, which have led to some misunderstanding as to what the law really is. Some of such cases have, by the learned counsel for appellant, been brought significantly to our attention.

It seems necessary at this time to take a general view of the decisions of this court in respect to counsel's contention that gross negligence permits a recovery of damages resulting therefrom notwithstanding contributory negligence of

the sufferer. By doing so we shall, we venture to say, make it clearly appear that any degree of negligence, strictly so called,— wrongful conduct which springs from inadvertence to any extent, whether of an active or passive character,— does not preclude the successful interposition of contributory negligence as a defense; while wilful misconduct, so concurring, does have that effect, such wilful wrong being what is sometimes referred to as wilful, malicious, or wanton, evincing intention to do an injury to another,— wrongful conduct which renders the guilty party properly liable to a claim for punitory damages and which does not fall within the scope of the term "negligence," though the term "gross negligence" has been so extended by this court and some others as to include it.

In *Stucke v. M. & M. R. Co.* 9 Wis. 202, the earliest case in this court where the subject under discussion was treated to such an extent as to influence the subsequent judicial history of the state, the rule above indicated was not stated sufficiently strongly to fully satisfy what has been said, though the facts of the case fully warranted it. A locomotive engineer caused his engine to collide with a cow on the railway track and kill her under such circumstances as to clearly indicate an intention to produce that result. It was not an act of negligence, but a wilful act, as that term is ordinarily used in the law, indicating intention. There was no reasonable ground to say that the engineer's act was characterized by any element of inadvertence. The court, in discussing his conduct, called it gross negligence, but demonstrated what was meant thereby by quoting with approval Lord DENMAN, C. J., in *Lynch v. Nurdin*, 1 Adol. & E. (N. S.), 29 (41 Eng. C. L. 422), to the effect that the boundary line between wilful mischief and gross negligence is so hard to trace that it cannot be discovered with judicial certainty. "The law blends one into the other and considers that gross negligence indicates, to some extent, malice." That was

followed in another paragraph by a general observation as to the law which did not accurately measure the facts of the case, nor come up to the standard of wrongful conduct that Lord DENMAN placed within the scope of the term "gross negligence" which is necessary to preclude the defense of contributory negligence. Such general observation, if it did not clearly enter the domain of comparative negligence, came dangerously near its boundaries. We refer to the following: "Where the facts show such degree of rashness or maliciousness on the part of the servants of the company as to evince a total want of care for the safety of the cattle or willingness to destroy them [there is no trouble up to that point], though such destruction may not have been intentional [there is the difficulty, if the word "intentional" be understood in any other sense than premeditated design], we think it is no departure from justice or principle to hold the company responsible unless it appears that the plaintiff was equally negligent." However, that the court did not decide that negligence, strictly so called,—even gross negligence, except as that term was extended to include wrongful acts not characterized by any degree of mere inadvertence,—precludes the defense of contributory negligence, was demonstrated by many decisions thereafter rendered, in some of which the learned chief justice who wrote the opinion participated and pronounced the judgment of the court, and in none of which was it found necessary to even criticise the *Stucke Case.*

In *Potter v. C. & N. W. R. Co.* 21 Wis. 372, an instruction given to the jury by the trial court, to the effect that if the plaintiff was guilty of slight want of ordinary care (the word "negligence" was used, but in subsequent cases corrected), contributing to his injury, he can nevertheless recover if the defendant was guilty of gross negligence which was also a contributing cause, was condemned, the court announcing the true rule of law to be that negligence (mean-

ing want of ordinary care), however slight, contributing to the injury, prevents a recovery therefor. The language of Judge DOWNER in the *Potter Case* was quoted with approval in *Cunningham v. Lyness*, 22 Wis. 245, with the remark that, 'Substantially the same principle has been decided by the court in many cases, that a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause.' To that all previous cases on the subject were cited, commencing with the *Stucke Case.*

In *Ward v. M. & St. P. R. Co.* 29 Wis. 144, opinion written by DIXON, C. J., the *Potter Case* was again referred to with approval, this language being used: "The law does not attempt to measure how little or how greatly the plaintiff may have fallen short of using ordinary care, but any failure in this respect or slight want of such care, contributing directly to the injury, will forbid a recovery."

Potter v. C. & N. W. R. Co. was again referred to in *McCandless v. C. & N. W. R. Co.* 45 Wis. 365, accompanied by language unmistakably indicating a judicial view that wrongful conduct exceeding mere negligence in any of its degrees as ordinarily understood, that is, as characterized by inadvertence, is essential to prevent the defense of contributory negligence being effective. The position of the court as thus maintained can be most quickly and definitely stated by quoting from the opinion written by Mr. Justice TAYLOR, as follows: "This court has held that slight negligence or slight want of ordinary care on the part of the plaintiff, which contributed directly to the injury complained of, would defeat an action even when the negligence of the defendant was gross. *Potter v. C. & N. W. R. Co.* 21 Wis. 372; *Cunningham v. Lyness*, 22 Wis. 245. . . . There was no evidence to go to the jury upon the question of whether the injury was produced by the wilful or malicious act of the servants of the defendant, and we think that nothing short of that would have justified a verdict in favor of the plaintiff."

The doctrine firmly established by the foregoing was so emphasized in *Randall v. N. W. Tel. Co.* 54 Wis. 140, that no room was left to misunderstand the purport of our judicial history up to that time or opportunity for departing therefrom in the future, consistent with a familiarity with such history, without evincing an intention to adopt, to some degree at least, the doctrine of comparative negligence. In discussing instructions given by the trial court which followed the lines of the most extreme notions of comparative negligence, Mr. Justice TAYLOR, speaking for the court, said: "Such a rule of weighing comparative negligence of the parties has never been adopted in this state. The rule in this state is that slight want of ordinary care which contributes to the injury will defeat the plaintiff's action, no matter how gross the negligence on the part of the defendant, unless such negligence be so gross that the court and jury may infer that the act of the defendant was malicious," citing all the cases heretofore referred to, commencing with *Potter v. C. & N. W. R. Co.* It is significant that some years later Mr. Justice TAYLOR, in *Schilling v. C., M. & St. P. R. Co.* 71 Wis. 255, 261, probably without intending to be inconsistent with the established doctrine of the court as by himself distinctly stated in the two opinions to which we have referred, dissented from the decision there rendered, upon the theory, as we read his opinion, of comparative negligence. He assumed that mere negligence of the defendant of a high degree — conduct short of such as imports an intention to injure — will preclude the successful interposition of the defense of contributory negligence. He referred to the conduct of the defendant as gross negligence sometimes, and as negligence at others, but there was no evidence in the case, as the court, we must assume, decided, indicating a wilful injury even to the extent of a conscious disregard of whether the injury which in fact took place would be produced by his conduct.

In *Schoenfeld v. Milwaukee City R. Co.* 74 Wis. 433, it is said that, "The law has grown to be elementary that any negligence of the plaintiff, however slight, that contributed to the injury complained of, precludes his recovery." That was followed by language for the first time, so far as we have discovered in any opinion of the court, giving color to the idea that gross negligence of the defendant, as the term is ordinarily understood, that is, having regard to the essential element of inadvertence, though of a high degree, is actionable regardless of his victim's contributory negligence. This is the language: "The learned counsel of the appellant contends that inasmuch as the defendant was guilty of gross negligence that caused the injury, the principle does not obtain. But neither the facts in evidence nor the finding of the jury made the defendant guilty of gross negligence. It was mere negligence and not wilful or gross that the jury found against the defendant. The authorities cited to this point are therefore inapplicable." When rightly understood it is clear that the word "gross" as there used referred to the wilful misconduct which was said in previous decisions to indicate intent. Mr. Justice ORTON used the terms "wilful" and "gross" in close connection, the latter being really used as explanatory of the former. Of that there can be no doubt, since *Potter v. C. & N. W. R. Co.* 21 Wis. 372, and the other cases to which we have referred, were cited with approval, where it was distinctly stated that gross negligence, using the term as indicating inadvertence, does not permit a recovery for an injury caused proximately thereby in the face of contributory negligence of the injured person contributing thereto.

Valin v. M. & N. R. Co. 82 Wis. 1, is recognized as out of harmony with previous decisions of this court. It was there said that negligence less than gross will permit a recovery even though the injured party be guilty of contributory negligence. The term "negligence," by itself, was

evidently used as extending to the boundaries of inadvertence, and the term "gross," in connection with the term "negligence," as indicating wrongful conduct of a still higher degree. The departure which the opinion indicates from the law as previously declared was corrected in *Lockwood v. Belle City St. R. Co.* 92 Wis. 97. Though it was there said, in effect, that contributory negligence of the plaintiff will not militate against his right to recover as against gross negligence of the defendant, it was plainly indicated that the latter term was used as descriptive of conduct evincing wilfulness, as the word is used in the law, as synonymous with intent, either premeditated or its equivalent, as regards legal liability for damages. The present chief justice there said, in effect, that inadvertence, in some degree, is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness, and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence. The purpose of the opinion was to correct *Valin v. M. & N. R. Co.* and to pronounce the law as in *Potter v. C. & N. W. R. Co.* 21 Wis. 372, to which we have referred, such case being cited as the groundwork of the decision. The term "rashness, wantonness, and recklessness" was used as synonymous with "wilful or malicious" in *Randall v. N. W. Tel. Co.* 54 Wis. 140, and in *McCandless v. C. & N. W. R. Co.* 45 Wis. 366, "wilfully, maliciously, or intentionally" in *Lynch v. N. P. R. Co.* 84 Wis. 348, "wilful or gross" in *Schoenfeld v. Milwaukee City R. Co.* 74 Wis. 433, and similar expressions. It is perhaps unfortunate that so many different expressions have been indulged in to express the idea of wilful as regards the result caused,— conduct indicating a sufficient degree of intent, at least, to be inconsistent with inadvertence, the distinguishing characteristic of negligence, strictly so called. The difficulty, if there be one, has grown out of extending the term

"negligence" in connection with the term "gross" so as to cover wrongful conduct distinct from negligence, strictly so called, by including in it an element of advertence instead of inadvertence. Wilful, in legal parlance, means intentional, though not necessarily that express intent characterized by premeditated design.

That the language in *Lockwood v. Belle City St. R. Co.* 92 Wis. 97, was intended as indicated, is fairly demonstrated by the following, used by the same writer in *Lynch v. N. P. R. Co.*, *supra*, in part heretofore referred to: "There is no sufficient evidence in the record to sustain the finding that the engineer was guilty of gross negligence. In fact the jury expressly exculpated him from wilfully, maliciously, or intentionally injuring either of the horses." To the same effect is *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, where it was said that gross negligence that cannot be defended against by contributory negligence is that rashness or wantonness which evinces a total disregard for the safety of persons or property and is but little less than intentional wrong. Also, *White v. C. & N. W. R. Co.* 102 Wis. 489, 496, where it was said that in all cases where the recovery is based on negligence the plaintiff's conduct must be free from contributory negligence however slight, if the defendant's negligence is short of that which may be justly called wilful. See, also, *Duame v. C. & N. W. R. Co.* 72 Wis. 523; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301.

There are other cases that might be referred to bearing on the subject discussed, but it is believed there are none that would furnish additional light or vary the conclusion to which those we have mentioned unerringly point. There has been substantial harmony in the adjudications of this court from the first, leaving out *Valin v. M. & N. R. Co.* 82 Wis. 1, and *Little v. Superior R. T. R. Co.* 88 Wis. 402. In the latter case there was a plain departure from the position of the court up to the time of the *Valin Case*, on the doctrine

of comparative negligence. That occurred by following such case. With the exceptions noted such doctrine has not found any place in our jurisprudence, though in some jurisdictions it has become firmly intrenched; and in one, after becoming so intrenched, the mischief of it was avoided by a legislative return to sound principles. The first departure here was corrected in *Lockwood v. Belle City St. R. Co.*, as we have seen. The second departure was corrected in *Johnson v. Superior R. T. R. Co.* 91 Wis. 233.

Want of ordinary care upon the part of an injured person, however slight, precludes recovering compensation for his injury from another who contributed thereto by his *negligence*, however great, but not if so contributed to by wilful misconduct evincing intention to produce it, so far, at least, as to indicate conscious disregard of whether the injury occur or not, with knowledge that such a result will probably take place, which this court has brought under the head of the highest degree of negligence, calling it gross negligence. Circumstances making a claim for punitory damages against the immediate wrongdoer proper are really necessary in order to render contributory negligence of the injured party immaterial.

In the light of the foregoing, was contributory negligence material in this case? Counsel for both sides concede that such was not the situation unless the misconduct of the trainman was of that degree necessary to render the fact that the deceased was a wilful trespasser immaterial, that is, unless his conduct was such as to evince an intention to injure the deceased, or such an utter disregard of the consequences of his act as to indicate that willingness to injure him which is equivalent, in respect to legal damages, to intent to produce the result. That is unquestionably the law as it has been stated by this court, and most recently in *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515. It is so laid down by standard text writers, as, for example: 'If a railroad com-

pany wilfully injure a trespasser, it will be liable even though he may be guilty of contributory negligence. In some jurisdictions the term "gross negligence" is used.' Elliott, Railroads, § 1254. "A railroad owes trespassers no contract duty. Indeed, as already stated, the general rule is that it owes them no duty except not to wilfully injure them; and this applies to those who are attempting to steal a ride or otherwise trespass upon the company's cars." Id. § 1255. A trespasser on a railroad train may recover for a wilful injury inflicted upon him by the trainmen in the performance of their master's duty. Shearm. & Redf. Negligence (5th ed.), § 64.

So it follows that whether the defense of contributory negligence and the finding of the jury in that regard were material, as well as the right of plaintiff to recover independent of it, turns on whether we can say that the trial court erred in holding that, looking at the evidence in the most favorable light for the plaintiff that reason will permit, and giving to him the benefit of the most favorable inferences it will reasonably bear, it does not indicate that the defendant's conductor was guilty of wilfully injuring the deceased. It seems that such question must be answered in the negative. There is no reasonable ground for saying that the conductor knew or ought to have known that a personal injury to the deceased would probably occur by his obeying the command to leave his position on the bumper of the car and cease his unlawful act of trespassing upon the defendant's property. The conductor supposed, and had a right to suppose, under the circumstances, that the deceased was a man of experience in jumping on and off trains when they were moving at a speed of more than four miles an hour; that he belonged to a class that were accustomed to such conduct and without putting themselves in any serious danger of receiving personal injuries. The evidence is all one way to that effect. The train was going at no greater speed than a man can walk. It was still at

the depot platform which the deceased left but a moment before he was injured to secure his place between the cars. He had the same means of safely leaving the train that he had in boarding it, save that it had in the meantime commenced to move slowly. Others of his class and with whom he had been associated were at that very time seeking to evade the vigilance of the trainmen and to board the train by seeking a position similar to that occupied by the deceased. He was not physically coerced. His ability, mental and physical, to care for himself was not reasonably impaired by anything which the conductor did. The circumstances were very unlike those in *Stone v. C., St. P., M. & O. R. Co.* 88 Wis. 98. That did not turn on the mere fact that the train was in motion, but the fact that it was going at a dangerous rate of speed, some eight miles an hour; and the further fact that the injured person was not a professional trespasser upon railway trains, but was one who appears to have boarded the train to ride as a passenger, supposing that he would be permitted to do so, and in that view took his place in the caboose. Nor is the case like *Carter v. L., N. A. & C. R. Co.* 98 Ind. 552, where a trespasser was pushed off the front end of a switch engine while it was in rapid motion, and in such a way that he was unable to exercise judgment in making the movement, and was thereby caught under the wheels of the engine and seriously injured. Neither is it at all like *Kansas City, Ft. S. & G. R. Co. v. Kelly*, 36 Kan. 655, where the case turned on the dangerous rate of speed the train was moving, some eight miles an hour; that the injured person was a boy; and that he was compelled to jump from the ladder of a box car in the face of apparent imminent danger of being thrown from his position. It is just as much unlike *Ansteth v. Buffalo R. Co.* 145 N. Y. 210, where the injured person was a lad ten years of age and was so terrified that he dropped from a car upon which he was riding while in momentary

loss of self-control. Such cases, and others upon which reliance is placed, are quite distinguishable, and have been distinguished in adjudications by other courts, from cases like this, two elements of distinction being referred to as of controlling significance: the speed of the train, and the inability of the injured party, by reason of the wrongful conduct of another, to use his judgment and control his movements. *Mugford v. B. & M. R. Co.* 173 Mass. 10; *Planz v. B. & A. R. Co.* 157 Mass. 377. Those cases are in harmony with the cases upon which counsel for appellant mainly rely, so far as the latter do not enter the domain of comparative negligence. They hold, and rightly, in our judgment, that there is no actionable wrong, if wrong at all, in insisting upon a person who is a wilful trespasser upon a railway train ceasing his unlawful conduct instantly, if the train be not going at such a rate of speed as to render that unreasonably dangerous under the circumstances and the trespasser be not ill-used so as to cause him to momentarily lose his judgment or self-control. We perceive no difficulty in the rule of the Massachusetts cases when rightly understood. The Massachusetts court holds as strongly as any other that a trainman cannot, in the pursuit of his master's business, wilfully injure a trespasser on his train without the master thereby becoming liable for the resulting damages, but that he may properly command such a wrongdoer to end the trespass at any time, not accompanying such command by conduct indicating such imminent danger of its being so enforced as to produce involuntary compliance therewith. If the command be obeyed and an injury to the trespasser result, the previous command will not evidence a wilful injury even if the speed of the train be such that to physically compel the trespasser to cease his unlawful conduct would render a resulting injury wilful and actionable. The doctrine seems sound, and it applies to this case so far as it fits the facts. The respondent's con-

ductor commanded the deceased to leave the train. He did not touch the deceased nor threaten violence to him nor do anything reasonably indicating that he was about to physically compel deceased to cease the trespass and to accept imminent danger of receiving a personal injury in doing so.

It must be admitted that *Johnson v. C., St. P., M. & O. R. Co.* 94 Fed. Rep. 473, goes much further than the doctrine referred to. We do not deem it necessary to even discuss in this case the extreme views which United States District Judge SHIRAS there expressed. The doctrine that human life cannot wilfully be seriously imperiled to prevent or end a mere trespass upon property must not be invaded by courts even to remedy the menace and almost intolerable mischief caused by the conduct of those who habitually unlawfully contend with railroad trainmen to secure transportation upon their trains. But the inviolability of personal security against wilful injuries can be adequately secured without going to such an unreasonable length as to hold that a railway company cannot rid its trains of the presence of wilful trespassers without first stopping such trains. That would, in effect, deny such company the right to protect its trains at all against such lawlessness, as in that case such an army of men would be required to effect that result as to render the conduct of railway business impracticable.

Our statute (sec. 1818, Stats. 1898) requiring a train upon which a passenger is riding after having refused to pay his fare, to be stopped at a railway station or near a dwelling house before putting him off does not apply to such a case as this.

This opinion would need to be extended to a great length in order to review even a major part of the numerous cases cited by the learned counsel for appellant. While we cannot agree with his conclusions, we are much indebted to his industry and ability in reaching a right one.

A railway company may lawfully require a wilful tres-

passer upon one of its moving trains to immediately cease his unlawful conduct, by such means as not to indicate a willingness to deprive him of his self-control in leaving the train, the speed of such train not being so great that a personal injury to him should be expected to occur, giving due consideration to the duty of the trespasser to cease his lawlessness by all reasonable means in his power and reasonable expectation that he will use such means in attempting to do it. It is not sufficient to indicate an intentional injury that the party causing it had reasonable ground to expect that such a result was within reasonable probabilities, otherwise a violation of the duty to exercise ordinary care would, of itself, be sufficient to indicate such injury. The danger of inflicting a personal injury upon a person by the conduct of another must be such as to reasonably permit of a belief that such other either contemplated producing it, or, being conscious of the danger that it would occur, imposed that danger upon such person in utter disregard of the consequences, to warrant saying, reasonably, that the circumstances indicate willingness to perpetrate such injury. *Cleveland, C., C. & St. L. R. Co. v. Miller*, 149 Ind. 490.

By the Court.—The judgment of the circuit court is affirmed.

A motion by the appellant for a rehearing was, on February 1, 1901, held to have been waived by failure to serve and submit the arguments within the time required by Rule XX of this court.

BUCKMASTER, Administrator, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

108 353
112 163
56 LRA 251

November 19 — December 7, 1900.

108 353
115 206

Railroads: Killing of brakeman on track: Contributory negligence: Court and jury.

Plaintiff's intestate, a brakeman on an east-bound train which had been stopped by some obstruction while passing from the main track onto a side track at a station, about midnight, was sent back about half a mile to the west with lanterns and torpedoes to signal any train coming from that direction. By the rules of the company a red lantern placed between the tracks was a danger signal, requiring all trains to stop. Meanwhile, the obstruction being removed, the train passed onto the side track, and another train, which had come from the east, started westward. The intestate had then been gone about fifteen minutes. It did not appear whether or not the engineer of the west-bound train had any knowledge respecting him. His red lantern was standing between the rails about half a mile west of the station, and his white lantern outside of the rails. The track from the station to this point was straight and the lanterns in plain sight. The west-bound train had acquired a velocity of ten or fifteen miles an hour when it ran over the lanterns, breaking the red one, and ran over and killed the intestate, who must have been struck within a few feet of the lanterns. There was no evidence as to the giving of any signals. *Held* that, as a matter of law, the deceased must have had knowledge of the approaching train and have been guilty of contributory negligence. WINSLOW, J., dissents.

APPEAL from a judgment of the circuit court for Kenosha county: S. D. HASTINGS, JR., Judge. *Affirmed.*

Action by administrator on behalf of widow for damages resulting from the death of Ralph Tabor by alleged negligence of defendant. It appeared that Tabor, on May 11, 1898, was a brakeman running upon one of defendant's trains eastward through the town of Salem, in Kenosha county; that as his train was passing from the main track onto a side track, about midnight, it met with some obstruc-

tion or difficulty, stopping it partly on the main track, whereupon he was directed to go back westward about half a mile with both red and white lanterns, in order to flag any approaching train from that direction. That was part of his duty as a brakeman in operating his train. It appeared by the rules of the company that a red flag by day or a red lantern by night, placed between the tracks, constituted a danger signal, and any train must stop before passing it; that, in case of any stoppage on the main track between stations, the conductor must immediately send a flagman back with a red lantern and torpedoes at least half a mile. Such flagman is then to place torpedoes on the rails, and to remain there with his red lantern, to signal any approaching train until he receives a recall signal. Other rules emphasizing, but not materially modifying, the duty of men running trains to stop at such a signal, need not be quoted.

Meanwhile another train of the company came from the eastward to the station of Salem, and, when the obstacle to Tabor's train had been removed and it had passed onto the side track, such other train proceeded westward. Tabor had then been gone about fifteen minutes. There is no evidence as to whether the engineer or fireman of the west-bound train had any knowledge with reference to him. Tabor's red lantern was standing between the rails about half a mile west of Salem station; his white lantern outside of the rails. The track from the station to this point was entirely straight and unobstructed, and elevated five or six feet above the surrounding country, so that the lanterns were in plain sight. There is no evidence from the trainmen as to the occurrence, except from the brakeman of the west-bound train, who states that it had acquired a velocity of ten or fifteen miles an hour when it ran over the lanterns, breaking the red lantern to pieces, but not the white one, and ran over Tabor, whose body was found three or four rods west of the red lantern, but fragments of clothing and

of his body were found within six feet thereof and scattered along the track. There is no evidence as to the giving of any signals. A former answer which had been interposed by defendant in a previous action brought for this same injury, which was dismissed, not on the merits, was offered in evidence and excluded. That answer admitted that the lanterns were seen by defendant's employees operating the west-bound train.

At the close of plaintiff's testimony both parties rested, and on motion the court directed a verdict for defendant, whereupon judgment was entered, from which the plaintiff appeals.

For the appellant there was a brief by *A. E. Buckmaster* and *Heren, Robertson & Long*, and oral argument by *Mr. Buckmaster*.

Edward M. Hyzer, for the respondent.

DODGE, J. In the view we have taken upon the question of contributory negligence it becomes unnecessary to decide whether the breach of duty and regulation committed by the engineer of the west-bound freight train in running over and past the red-lantern signal to stop because of danger could be the proximate cause of Tabor's death, though much discussed by counsel. Neither need we pass upon the admissibility in evidence of defendant's former answer.

Considering the conduct of deceased, it must be conceded that the circumstances whereby the main track to the eastward of Tabor was blocked by his own train, so that he had no reason to expect the approach of a train from that direction, and the fact that his duty required his attention to be turned towards the west in the placing of lantern and torpedoes and in looking out for a train from that direction, were such as very largely to excuse inattention toward the east, and might render non-negligent failure to observe approach of a train therefrom, if it could be believed that he

in fact remained in ignorance thereof. But upon the most careful consideration we are convinced that such ignorance could not exist, that it was beyond reasonable possibility in view of the ordinary and uniform course of nature and of human nature. The man, shown to be healthy and alert, in possession of all his senses, in the stillness of midnight in May was approached by a freight train, which got under way only half a mile from him, and ran that half mile continually increasing its speed till at the time of the injury a speed of ten or fifteen miles had been attained, on a perfectly straight track elevated above the surface of the surrounding country. Whatever other duties he had to perform, these events could not have taken place without such a clamor of noises, significant to him as a railroad man, as must have informed and warned him. The noise of a freight train in the country, at midnight, is not a thing to pass unnoticed by any one in possession of the sense of hearing, unless, indeed, he be surrounded by other distracting noises, a circumstance not here present. Again, whether he were facing east or west the glare of the headlight must have so surrounded him that he could not have been oblivious to it. Thus, also, he must have been warned long enough before the train reached him to have enabled his escape from the track.

As the approach of this train was necessarily apparent to Tabor's senses, both sight and hearing, it is but the application of rules well established in this court to hold that the inference that he did see and hear is unavoidable, and that the jury could not have drawn a contrary one; nay, could not have been permitted to believe Tabor's direct testimony to the contrary had he been alive and given such evidence. *Haetsch v. C. & N. W. R. Co.* 87 Wis. 304, 311; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 152; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 465. If he knew that the train was approaching,

no reason consistent with due care can account for his presence upon the track in front of it. His duties, if he were engaged in any, even though the rules require that train to stop at the red lantern, could not justify him in remaining on the track until the train reached him (*Hulien v. C. & N. W. R. Co.* 107 Wis. 122); nor if, as seems not improbable, he had gone to a distance from his lanterns, could he be justified in risking his life by effort to rescue them from in front of the approaching train. No other or more charitable theory to account for his presence on the track can be reasonably entertained. If the accident be one which could happen only through decedent's negligence, then, of course, the accident itself establishes such negligence. *Cummings v. Nat. F. Co.* 60 Wis. 614; *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, 513. Such, we are convinced, is the case here. Tabor could not, in human possibility, have been upon the track without knowledge of the approach of this train, and, having knowledge, he could not have either remained or gone there in face of the peril without negligence. In such view of the case the direction of a verdict for defendant was properly given.

By the Court.—Judgment affirmed.

WINSLOW, J. I cannot agree that the evidence proves Tabor to have been guilty of contributory negligence as a matter of law. He was performing a duty which could only be performed upon the track, and which demanded that his attention be directed forward and not backward. He expected no train from the rear; at least there is no evidence to show that any such train was expected by any one. His red lantern was on the track, and was a signal requiring all trains to stop. It is evident he was with the lanterns. Presumptively he was performing the duty on which he was set. It is reasonable to suppose that he was endeavoring to disengage the torpedoes, which were tied to one of

the lanterns; but, whether this be true or not, there is no presumption that he was not doing some necessary act in discharge of his duty, and no proof, in my judgment, which shows as matter of law that he was not.

It is said that, if exercising ordinary care, he must have seen the headlight or heard the noise of the approaching train. This might well be said of a person approaching a crossing, but can it be said of the deceased? I think not. He was performing a duty requiring his presence on the track and his attention to the front. His lanterns were burning brightly by his side. They must, by reason of their close proximity, have outshone the approaching headlight until it was very close to him, perhaps too close to escape. His own train was within half a mile of him, and he knew that it could naturally be making some movements in his absence (as in fact it did). If, with this knowledge, surrounded by his own lanterns and intent on his duty, which required expedition, he did not see the headlight and did not discover that the noise was that of another train, rather than his own, until too late, can it be said as matter of law that he was exercising less than ordinary care? In my judgment this question should be answered in the negative. I think the engineer of the defendant's train was clearly guilty of negligence in running over the danger signal without stop or warning, and that the question of contributory negligence was properly one for the jury.

FOLK, Administrator, Appellant, vs. CITY OF MILWAUKEE, Respondent.

108	359
110	107
108	359
115	543
e115	544
108	359
117	259

November 19 — December 7, 1900.

Municipal corporations: Schools: Liability for death of pupil caused by defective sewer: Nuisance.

In maintaining its public schools a city is performing merely a public duty, and it is not liable for the death of a pupil caused by sewer gas escaping into the school building from a sewer therein which had negligently, and with knowledge of the city authorities, been allowed to become out of repair and clogged up.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action brought by the administrator of the estate of Florence Folk to recover damages for the death of said Florence, caused by the negligence of the defendant. The complaint alleged the death of Florence Folk, the intestate, on the 16th day of February, 1897, at the age of seventeen years; that she left surviving, as her sole heirs at law, her father and mother; that the plaintiff was duly appointed administrator of her estate on the 20th of November, 1897, and has duly qualified as such; that during certain months of the year 1896 the deceased, Florence Folk, was lawfully attending school at one of the public school buildings owned and maintained by said city of *Milwaukee*, and that while so attending, without fault or negligence on her part, she was made sick by sewer gas which escaped from the sewers in said building by reason of the fact that such sewers were negligently and carelessly allowed to become out of repair and clogged up, with the knowledge of the city authorities, so that they failed to carry off the refuse matter contained in them, thereby creating a nuisance; that said Florence Folk died February 16, 1897, in consequence of sickness caused by said poisoning; that notice of the claim was served

on the city officers January 14, 1898. A general demurrer to this complaint was sustained, and the plaintiff appeals.

For the appellant there was a brief by *Toohey & Gilmore*, and oral argument by *J. L. Gilmore*. They contended, *inter alia*, that the complaint states a good cause of action, upon the ground that the city created and maintained a nuisance which caused the plaintiff special and peculiar damages. *Briegel v. Philadelphia*, 135 Pa. St. 451; *Hughes v. Fond du Lac*, 73 Wis. 380; *Child v. Boston*, 4 Allen, 41–53; *Steltz v. Wausau*, 88 Wis. 618; *Cairncross v. Pewaukee*, 86 Wis. 181; *Harper v. Milwaukee*, 30 Wis. 365; *Rowland v. Kalamazoo Sup'ts of Poor*, 49 Mich. 553. Where the duty as respects drains and sewers ceases to be legislative or judicial or *quasi*-judicial and becomes ministerial, then, although there be no statute giving the action, a municipal corporation is liable for the negligent discharge of or the negligent omission to discharge such duty, resulting in an injury to others. Dillon, Mun. Corp. § 1048; *Ashley v. Port Huron*, 35 Mich. 296.

For the respondent there was a brief by *Carl Runge*, city attorney, and *C. H. Hamilton*, of counsel, and oral argument by *Mr. Hamilton*. They argued, among other things, that it is settled that in the absence of statutory authority, an action will not lie against a public corporation by an individual who has sustained special damages by reason of the neglect of such corporation to perform a public duty, from the performance of which the corporation would derive no profit or advantage. *Streiff v. Milwaukee*, 89 Wis. 218; *Hayes v. Oshkosh*, 33 Wis. 314; *Sussex Co. Freeholders v. Strader*, 18 N. J. Law, 108; *Cooley v. Freeholders of Essex Co.* 27 N. J. Law, 415; *Livermore v. Freeholders of Camden Co.* 29 N. J. Law, 245; *Pray v. Jersey City*, 32 N. J. Law, 394; *Marvin S. Co. v. Ward*, 46 N. J. Law, 19; *Wild v. Paterson*, 47 N. J. Law, 406; *Vorrath v. Hoboken*, 49 N. J. Law, 285; *Jersey City v. Kiernan*, 50 N. J. Law, 249; *Hill v. Boston*, 122 Mass. 344;

White v. Phillipston, 10 Met. 108; *Sawyer v. Northfield*, 7 Cush. 490; *Adams v. Wiscasset Bank*, 1 Me. 361; *Reed v. Belfast*, 20 Me. 246; *Farnum v. Concord*, 2 N. H. 392; *Clark v. Manchester*, 62 N. H. 577; *Edgerly v. Concord*, 62 N. H. 8; *State v. Burlington*, 36 Vt. 521; *Chidsey v. Canton*, 17 Conn. 475. In the maintenance of sewers and schools a city is acting in its public and governmental capacity. *Hill v. Boston*, 122 Mass. 344; *Wixon v. Newport*, 13 R. I. 454; *Hughes v. Auburn*, 161 N. Y. 96; *Bank v. Brainerd School Dist.* 49 Minn. 106; *Finch v. Board of Education*, 30 Ohio St. 37; *Bigelow v. Randolph*, 14 Gray, 541; Dillon, Mun. Corp. (4th ed.), § 965*a;* Shearm. & Redf. Neg. (5th ed.), § 267. A city is not liable for the negligence of its firemen. *Hayes v. Oshkosh*, 33 Wis. 314; *Alexander v. Vicksburg*, 68 Miss. 564; *Hafford v. New Bedford*, 16 Gray, 297. Nor of its policemen. *Ogg v. Lansing*, 35 Iowa, 495; *Calwell v. Boone*, 51 Iowa, 687; *Perkins v. New Haven*, 53 Conn. 214; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; *Elliott v. Philadelphia*, 75 Pa. St. 347. Policemen do not derive their powers and duties from the city or town which appoints them, but from the law, and they are not the city's servants. *Buttrick v. Lowell*, 1 Allen, 172; *Kimball v. Boston*, 1 Allen, 417. A city is not liable for an illegal arrest or imprisonment by the police. *Harris v. Atlanta*, 62 Ga. 290; *Cook v. Macon*, 54 Ga. 468. A county is not liable for injuries caused by negligence in not providing a railing around a veranda on the second floor of the court house. *Shepard v. Pulaski Co.* 18 S. W. Rep. 15. Nor for injury to a prisoner while confined in a county jail. *White v. Sullivan Co. Comm'rs*, 129 Ind. 396. Or in a free hospital. *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13. Nor for injury to a vessel caused by failure of a bridgetender to seasonably open a drawbridge. *Corning v. Saginaw* (Mich.), 40 L. R. A. 526. A city is not liable to a nonpaying patient at a city hospital for injuries resulting from the negligence and misfeasance of the officers and servants of such institu-

tion. *Murtaugh v. St. Louis*, 44 Mo. 479. A county is not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the poor. *Summers v. Comm'rs of Daviess Co.* 103 Ind. 262. A city is not liable for the negligence of its officers or agents in executing sanitary regulations, adopted for the purpose of preventing the spread of contagious disease, or in taking care and custody of persons afflicted with such disease. *Ogg v. Lansing*, 35 Iowa, 495. Nor for failure to prevent the spread of an infectious disease. *Brown v. Vinalhaven*, 65 Me. 402. Nor for negligence in the care of the insane. *Hughes v. Monroe Co.* 147 N. Y. 49. Nor for removing a healthy person to a pest house where he contracted the disease, when he was believed to be suffering with such contagious disease. *Barbour v. Ellsworth*, 67 Me. 294. Nor for ordering an infested ship to leave the harbor. *Rudolphe v. New Orleans*, 11 La. Ann. 242. Nor for taking possession of and detaining it. *Mitchell v. Rockland*, 41 Me. 363; *Harrison v. Baltimore*, 1 Gill, 264. The same rule of nonliability is applicable to cities required by statute to support paupers and orphans, and to maintain hospitals and institutions of a public nature, where the treatment is gratuitous, even when they are partly supported by private contributions. *Bryant v. St. Paul*, 33 Minn. 289; *Liberty v. Hurd*, 74 Me. 101; *Ogg v. Lansing*, 35 Iowa, 495; *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432; *Spring v. Hyde Park*, 137 Mass. 554; *Benton v. Trustees of Boston City Hospital*, 140 Mass. 13; *Carrington v. St. Louis*, 89 Mo. 208; *Maxmilian v. New York*, 62 N. Y. 160; *Ham v. New York*, 70 N. Y. 459; *Haight v. Mayor*, 24 Fed. Rep. 93; *Eastman v. Meredith*, 36 N. H. 284.

WINSLOW, J. The question is whether a city is liable for the death of a child lawfully attending one of its public schools, when such death is caused by negligently allowing the sewer of the school building to become clogged up. We

think this question must be answered in the negative. This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers where it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community. *Hayes v. Oshkosh*, 33 Wis. 314. The case cited was one where the negligence claimed was the negligence of firemen in the discharge of their duty, and the same principle has been applied to the acts of taxing officers, policemen, and health officers. *Wallace v. Menasha*, 48 Wis. 79; *Kuehn v. Milwaukee*, 92 Wis. 263; *Kempster v. Milwaukee*, 103 Wis. 421. That the city is performing such a public duty in maintaining public schools cannot be doubted. The principle is thus stated in 1 Shearm. & Redf. Neg. (5th ed.), § 267: "The duty of providing means of education at the public expense by building and maintaining school houses, employing teachers, etc., is purely a public duty, in the discharge of which the local body, as the state's representative, is exempt from corporate liability for the faulty construction or want of repair of its school buildings, or the torts of its servants employed therein." The leading case upon the subject is probably the case of *Hill v. Boston*, 122 Mass. 344, where the whole field was very learnedly and exhaustively discussed. This case has been followed in principle by other courts. *Wixon v. Newport*, 13 R. I. 454; *Donovan v. Board of Education*, 85 N. Y. 117; *Hughes v. Auburn*, 161 N. Y. 96; *Ford v. Kendall School Dist.* 121 Pa. St. 543; *Finch v. Board of Education*, 30 Ohio St. 37. While the exact question here presented is new in this court, the weight of authority (especially in Massachusetts, from which state we have so largely taken our doctrine as to municipal liability for torts) is so strong in favor of the rule quoted

above that we feel no hesitation in following it. Nor is the rule unreasonable. Indeed, were a recovery possible under the facts stated here, no reason is perceived why damages might not be allowed for every sickness suffered by a scholar which could be traced to defective or injudicious heating, ventilation, or lack of ventilation of a school building. Such a result would be intolerable, and might necessitate the closing of schools, by the exhaustion of funds to discharge such judgments.

We do not lose sight of the fact that there is another principle frequently approved by this court, namely, that a municipal corporation may not construct or maintain a nuisance in the street or upon its property to the damage of another, or negligently turn water or sewage upon the lands of another, without liability. *Gilluly v. Madison*, 63 Wis. 518; *Hughes v. Fond du Lac*, 73 Wis. 380; *Schroeder v. Baraboo*, 93 Wis. 95. These cases all go upon the principle that the city cannot in the management of its corporate property create a nuisance injurious to the property or rights of others. In none of these cases were the city officers who were guilty of negligent or wrongful acts acting in a governmental capacity toward the person injured. In the present case, however, there can be no doubt that in the management of the school house the city officials were acting in a purely governmental capacity, as far as their relations to the deceased child were concerned. This consideration is, we think, controlling, and results in affirmance of the ruling of the trial court.

By the Court.— Order affirmed.

SEEMAN, Respondent, vs. BIEMANN and others, Respondents, and FARR and another, Appellants.

108 365
112 *394
112 *541
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November 19 — December 7, 1900.

(1) *Appeal: Review of findings.* (2–4) *Contracts: Reformation: Damages for breach: Condition precedent: Penalty or liquidated damages?* (5–11) *Building contracts: Liens of subcontractors: Default of principal contractor: Agency: Lienable claims.*

1. The conclusions of a trial court on questions of fact cannot be disturbed on appeal unless they are against the clear preponderance of the evidence.
2. To warrant a court in changing the language of a written contract so as to conform to the preceding verbal agreement between the parties, there must be clear and satisfactory evidence that an error in reducing such verbal agreement to writing occurred through a mutual mistake or a mistake on one side and fraud upon the other.
3. If it be stipulated in a contract that recoverable damages for a breach thereof shall be contingent upon a claim being made therefor within a specified time and in a particular way, such condition is controlling.
4. If by the literal sense of a contract, expressed in general language, recoverable damages for a particular breach thereof be stipulated and be greatly in excess of actual damages, and the latter be readily ascertainable by computation, by a well settled but arbitrary rule of judicial construction, so called, the court will say the parties intended what was reasonable, treat the stipulated amount as a penalty, and confine the recovery of the party damnified to such sum as will measure his actual loss according to the ordinary rules for assessing damages for breach of contract.
5. In an action to enforce a subcontractor's lien under the statutes of this state, the owner of the property affected is entitled to the benefit of all the defenses against the claim possessed by the principal contractor.
6. If a building contract stipulate that there shall be no liens filed upon the building under the lien laws of this state, a subcontractor will be held to be a party thereto and bound thereby.
7. An agreement in a building contract that the contract price shall in whole or in part be retained by the owner till all lienable claims be paid, or that it shall constitute a trust fund to pay them, recognizes the probability of there being such claims rather than stipulates that no liens shall be filed.

8. The fact that the principal contractor has not complied with the conditions of his contract so as to enable him to enforce a lien on the building, will not militate against the subcontractor enforcing such a lien if the subject of the subcontractor's lien might in any event be lienable in favor of the principal contractor.

9. So long as a builder under a building contract keeps within the scope of his contract, as regards material and labor wrought into the building and the character of such building, he is deemed to be the accredited agent of the owner to incur indebtedness therefor, and the circumstance that the amount of such indebtedness exceeds the contract price of the building or is due to a subcontractor before the maturity of the principal contract, does not militate against said subcontractor enforcing his claim under the lien statutes.

10. Damages for breach of contract in the construction of a building, recoverable by a principal contractor or by a subcontractor, do not constitute a lienable claim.

11. The rule that there must be an improvement on land, satisfying the calls of the statute in that regard, in order that a lien may attach to such improvement and in connection therewith to the interest of the owner of the land upon which it is located, and that for want of such circumstance a principal contractor cannot have a lien upon the property, and that his subcontractor has no greater right, does not require a principal contractor to be so circumstanced that he can enforce a lien in order that his subcontractor may do so. The rule goes to the lienability of the claim, not to its enforcement.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Modified and affirmed.*

Action to enforce subcontractors' and other liens upon property under ch. 143, Stats. 1898. The cause was tried by the court, and the findings, so far as material to this appeal, were as follows:

On March 12, 1897, *Otto Biemann*, *C. O. Koehler*, and *John Bruening*, as copartners, contracted in writing with defendant *William Farr* to furnish the materials and perform the carpenter and joiner work in the erection and construction of a building mentioned in the complaint. The contract re-

quired the roof to be completed April 3, 1897, and the whole house to be completed May 22, 1897, provided the work was not delayed by other contractors or by weather, strikes, or other unforeseen causes. The contract further provided that in the event of the work not being completed at the time agreed upon, the builders should forfeit the sum of $10 as liquidated damages for each day's delay after May 22, 1897. such sum to be deducted from the amount of the contract.

The builders operated under the name of Biemann & Co. The stipulated price for the material they agreed to furnish was $1,240. Upon the contract there was indorsed a bond which is in the following form:

"Know all men by these presents: That we, *O. Biemann*, *C. O. Koehler*, and *John Bruening*, as principals, and *Charles G. Forster* and *J. J. Jones*, as sureties, both of the city of Milwaukee, are held and firmly bound unto Anton Dohmen of the same place in the sum of twelve hundred and forty dollars, lawful money of the United States, to be paid to the said ——, his executors, administrators, or assigns, for which payments, well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

"Seal with our seals, dated the eleventh day of March, 1897.

"The conditions of the above obligation are such that if the above-bounden *O. Biemann*, *C. O. Koehler*, and *John Bruening*, *Charles G. Forster*, their executors, administrators, or assigns, shall in all things stand to and abide by, and well and truly keep and perform, the covenants, conditions, and agreements in the within contract contained, on his part to be kept and performed, at the time and in the manner and form therein specified, and shall well and truly pay or cause to be paid all material used and all work and labor employed in the performance of the covenants of the within contract whenever the same shall become due and payable,

and shall save harmless said Anton Dohmen from any and all liens, suits, and damage, arising or caused by reason of the nonpayments of such work or material or any part thereof, then this obligation to be null and void, otherwise to remain in full force, virtue, and effect."

The bond was signed by the contractors, by *Charles G. Forster* and *J. J. Jones.*

The sureties on the bond intended, in signing it, to become sureties for the benefit of Anton Dohmen, according to the letter thereof.

At the time *Farr* made the contract with Biemann & Co. he made six other contracts for doing work upon the building mentioned, each of which specified that the building was to be completed by May 22, 1897, and that the contractor should forfeit $10 per day as liquidated damages for each day's delay.

The total amount of all the contracts was $5,000 and the value of the buildings and lands was less than $6,000.

The rental value of the completed building was $38 per month.

Biemann & Co. were delayed in commencing their work by other contractors for about twelve days.

They fully completed their work by about July 15, 1897.

The *Forster Lumber Company* furnished to Biemann & Co. building material of various kinds to the amount of $466.09, no part of which has been paid for except $200.

The *Forster Lumber Company* complied with all the conditions of the statute entitling it to a subcontractor's lien for the balance of the claim, to wit, $268.09, with interest thereon from July 3, 1897.

The plaintiff, *Gustav Seeman*, furnished building material to Biemann & Co. to be used and which was used in the construction of the building, to the amount of $45, which sum, with interest from July 7, 1897, at six per cent. per annum, is due the plaintiff.

Plaintiff performed all the conditions of the statutes entitling him to a subcontractor's lien for the amount of his claim.

Defendant *Frank Moody*, as surviving member of Moody & Krueger Company, furnished to Biemann & Co. building material for use and which was used in the construction of the building, to the amount of $441.75. All the conditions of the statute were complied with, entitling *Moody* to a subcontractor's lien for the amount of his claim.

Defendant *John J. Jones* furnished Biemann & Co. building material and manufactured articles for use and which were used in the construction of the building, to the amount of $81.20. He performed all the conditions of the statutes entitling him to a subcontractor's lien for the amount of his claim.

The action, as to all the lien claimants, was commenced within the time required by law.

Biemann & Co. were delayed by bad weather and by defendant *Farr* and other contractors so that they are not chargeable with any breach of their contract in that the building was not finished earlier than July 15, 1897.

Judgment was ordered in accordance with the findings, there being sufficient findings other than those specially mentioned to cover all formal matters.

Before the commencement of this action *Moody* commenced an independent action to recover his claim. He did not answer in this action till after the case was tried, and he was then permitted to file the complaint in his action as his answer in this action.

Issues were made up in this action as to whether the bond was intended to secure Architect Dohmen or to secure the proprietor of the building, *Farr*. *Farr* endeavored to secure a reformation of the bond, claiming that it was intended by all parties to secure him. The issue in respect to

that claim was decided in favor of the bondsmen, as before indicated.

The contract with Biemann & Co. contained this provision which was not referred to in the findings:

"If by reason of fire, lightning, tornado, or other natural causes; riot, insurrection, or generally prevailing strikes affecting the delivery of material necessary to be used and causing a general cessation of business; or if by reason of neglect, delay, or default on the part of the owner, or any contractor employed by the owner, the contractor shall be unavoidably delayed or obstructed, then the time fixed herein for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of said causes; but unless the contractor shall notify the architect in writing, in each instance, of his intention to claim an extension of time, within twenty-four hours from the time of the occurrence of the alleged cause of delay, he shall thereby waive all right to said extension. If the architect and contractor are unable to agree upon the duration of the extension, or as to whether any extension should be granted, the question shall be settled by arbitration, as provided for in article II. But, while the question is pending the work shall progress as usual and the contractor shall make no claim for extension by reason of the pending arbitration." There was no evidence indicating that any claim was made in writing under this provision of the contract.

Various exceptions were filed to the findings of fact and conclusions of law, sufficient to preserve for review the questions discussed in the opinion.

Geo. L. Williams, for the appellants, argued, among other things, that the court should have reformed the bond in accordance with the defendant's cross complaint and have held the sureties *Forster* and *Jones* liable on the same. *Ihrig v. Scott*, 5 Wash. 584; *Wadsworth v. School Dist.* 7 Wash. 485; *Sears v. Williams*, 9 Wash. 428; *Leonard v. Speidel*, 104 Mass.

356; *Montville v. Haughton*, 7 Conn. 543; *Wiser v. Blachly*, 1 Johns. Ch. 607; *Kincannon v. Carroll*, 9 Yerg. 11; *Armistead's Adm'r v. Bozman's Heirs*, 1 Ired. Eq. 117; *Nicholay v. Kay*, 6 Ark. 59; *Hale v. Russ*, 1 Me. 334. Any person for whose benefit a bond is given, and who is, according to the proper construction of the bond, to be primarily benefited, or who is one of the primary beneficiaries of such bond, can maintain an action thereon against the sureties for his benefit. *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17, and cases there cited; *Huntington v. Fisher*, 27 Iowa, 276; *Baker v. Bryan*, 64 Iowa, 561; *Jordan v. Kavanaugh*, 63 Iowa, 152; *Parker v. Jeffery*, 26 Oreg. 186; *Hughes v. Oregon R. & N. Co.* 11 Oreg. 437.

For the respondent *Seeman* there was a brief by *Fiebing & Killilea;* for the respondent *Jones* there was a brief by *Charles H. Phillips;* for the respondent *Moody* there was a brief by *J. A. Eggen;* for the respondents *Forster Lumber Co.* and *Charles G. Forster* there were briefs by *Nath. Pereles & Sons;* and the cause was argued orally by *C. F. Hunter.*

MARSHALL, J. The principal question presented for adjudication is raised by exceptions to the findings of fact respecting the cause of action pleaded by the owner of the building against defendants *Jones* and *Forster* for a reformation of the bond indorsed upon the back of the building contract making it run to such owner instead of to his architect, Dohmen. The evidence upon which the conclusions of the trial court are based has been examined without disclosing any warrant for this court to say they are clearly against the preponderance of such evidence. Clear and satisfactory evidence of mutual mistake, or of mistake upon one side and fraud upon the other in reducing a contract to writing, is required to warrant changing such writing with a view to express the actual agreement of the parties. The direct evidence here is substantially all to the effect that the obligors

knew when they signed the bond that Dohmen was the obligee therein named. They were told that he wanted a bond from the builders and signed the paper upon a request to become bondsmen for him, as they understood it, and in a measure because of their acquaintance with and regard for him. *Forster* wrote the name of Dohmen in the bond as obligee, which leaves no room to doubt that he knew its import when he signed it and that he became a party thereto with full understanding that he thereby became obligated only to Dohmen. True, there is some reason to say the bondsmen must have known that the object of the bond, so far as the owner of the building and the contractor were concerned, was to secure the former; but that does not militate against the theory that they did not intend to become parties to effecting such purpose. If they did not sign the paper for the benefit of the owner of the building or perpetrate any fraud upon him, whereby he, in the exercise of ordinary care, was induced to accept such paper in the belief that it ran to him as obligee, it cannot be properly changed so as to carry out his purpose. There is no evidence to sustain fraud and no satisfactory evidence of mutual mistake.

The court, in failing to charge the contractors, Biemann & Co., with damages for delay in completing the building by the time named in the contract, must have entirely overlooked the provision thereof that "unless the contractor shall notify the architect in writing, in each instance, of his intention to claim an extension of time, within twenty-four hours from the time of the occurrence of the alleged cause of delay, he shall thereby waive all right to said extension." Parties have a right to make such a stipulation in a building contract, and if they do so they are bound by it the same as by any other part of their agreement. If a contractor agree in writing to construct a building without taking reasonable time therefor, or agree that relief from delays caused by unforeseen causes shall depend on claims being

made therefor in a particular manner and within a specified time, he must comply with such conditions or he will be held to have waived such relief.

The building was to have been completed by May 22, 1897. It was not finished till July 15, 1897. There was a delay of one month and twenty-three days. There was no evidence of any claims being made for allowances of time as provided in the contract, so the contractors were clearly liable to the appellant *Farr*, upon the proper rule for computing his damages under the agreement.

That brings us to the necessity of determining whether the parties agreed upon $10 a day as the amount to be allowed as damages for each day's delay, or whether that clause in the contract was intended as a mere security for the completion of the building by the time agreed upon, hence should be considered as a penalty and the recoverable damages be limited to such as proof shows *Farr* actually sustained.

The law is too well settled to permit any reasonable controversy in regard to it at this time, that where parties stipulate in their contract for damages in the event of a breach of it, using appropriate language to indicate that the damages are agreed upon in advance, and such damages are unreasonable considered as liquidated damages, the stipulated amount will be construed to be a mere forfeiture or penalty and the recoverable damages be limited to those actually sustained. While courts adhere to the doctrine that the intention of the parties must govern in regard to whether damages mentioned in their contract are liquidated, they uniformly take such liberties in regard to the matter, based on arbitrary rules of construction, so called, as may be necessary to effect judicial notions of equity between parties, guided of course by precedents that are considered to have the force of law, sometimes calling that a penalty which the parties call stipulated damages, and that which the parties

call a penalty stipulated damages, where otherwise an unconscionable advantage would be obtained by one person over another. The judicial power thus exercised cannot properly be justified under any ordinary rules of judicial construction. Such rules permit courts to go as far as possible to effect the intent of the parties where it is left obscure by their language so long as such intent can be read out of the contract without violating the rules of language or of law. But in determining whether an amount agreed upon as damages was intended as liquidated damages or as a penalty, rules of language are ignored and the expressed intent of parties is made to give way to the equity of the particular case, having due regard to precedents as before indicated. Here the damages are said by the parties to be agreed upon at $10 per day for each day's delay, to be deducted from the contract price, indicating about as clearly as language can that they intended that such damages should be considered as irrevocably stipulated damages; yet the uniform rule is that such circumstance does not absolutely control.

This court, in harmony with the weight of authority, early adopted the arbitrary rule that where damages may be readily computed and the stipulated damages, so called, are largely in excess of actual damages, the court will disregard what the parties say they intended, and presume that they intended what is fair and reasonable under the circumstances, however much that may violate their language. *Pierce v. Jung*, 10 Wis. 30; *Fitzpatrick v. Cottingham*, 14 Wis. 219. In *Berrinkott v. Traphagen*, 39 Wis. 219, there is found quoted with approval from 3 Parsons, Cont. 156, language to the effect that parties may contract for stipulated damages at their pleasure, but such damages only as the law says are liquidated according to the artificial rules which have been adopted to justify courts in saying what the parties intended are in fact to be regarded as such damages. The most significant of such rules is the one above referred

to. Applying it to the case before us, the stipulation of $10 per day for delay must be held to be a penalty merely, and not necessarily recoverable to the whole amount. The rental value of the property as found by the court was $38 per month. That is the true measure of actual damages, since there were no special circumstances shown by the evidence, brought home to the knowledge of the contractor at the time of the making of the contract, from which we can say the damages which the parties then had in contemplation as the probable result of a breach of the contract as to time of completing the building were other than loss of use for the period of delay. *Guetzkow Bros. Co. v. A. H. Andrews & Co.* 92 Wis. 214; *Kennedy v. South Shore L. Co.* 102 Wis. 284.

The rental value of the building is trifling in amount as compared with the stipulated damages, so called, of $10 per day. There was, in the nature of the case, at the time the contract was made, no difficulty to be apprehended in arriving at the actual damages that might arise from mere delay in completing the building. So we have the two elements recognized as controlling the language of parties respecting stipulated damages, first, the amount the parties say they agreed upon is grossly in excess of the actual damages sustained or that could have been reasonably apprehended at the time of making the contract; second, the damages actually sustained are readily ascertainable.

It follows that we must hold that the parties intended the $10 per day as a mere penalty to secure the performance of the contract, and limit the recoverable damages to such as were actually sustained, to wit, $38 per month for fifty-three days, or $67.13, with six per cent. interest thereon from the date the breach of the contract was complete, July 15, 1897.

The question is raised as to whether the amount adjudged to defendant *Frank Moody* is excessive, and it seems that such question must be answered in the affirmative, in regard to the following matters.

Moody's contract required him to furnish all the "mill work, except bathtub tops, sink tops, shelving, drawers, flour bins, and stairs," for $440. The evidence is practically all one way that certain closets were intended to be included in "mill work," which *Moody* neglected to furnish, and which were furnished by defendant *Jones* and included in the amount allowed to him at $42. *Moody* seems to have construed the contract as not including any part of the closets, except the doors thereto, but in the light of the testimony we must say that is wrong. The closets were clearly included in the term "mill work" and not excluded by any of the exceptions. How it occurred that the full amount of *Moody's* contract price was allowed to him, and the charges for closets which it in part included, as *Moody* himself understood, were allowed in full to *Jones*, does not clearly appear. The excuse given by *Moody* for not wholly fulfilling his agreement is that he was unable to obtain the necessary detail drawings to work by, from Biemann & Co. If that were so, *Moody's* recovery could only be justified as damages, and damages do not constitute a lienable claim. *Siebrecht v. Hogan*, 99 Wis. 437; *Kennedy v. South Shore L. Co.*, *supra*. Our conclusion is that *Moody's* claim must be reduced by the amount allowed *Jones* for the closets, $42 and interest thereon at the rate of six per cent. per annum from June 30, 1897.

A claim is made that *Moody* delayed the work of Biemann & Co. some forty days; that the company's delay in large part is attributable to that fact; and that they should recoup in this action for the benefit of themselves and of *Farr* the damages which such misconduct caused. On the general proposition that *Farr* is entitled to insist upon all defenses which Biemann & Co. had to *Moody's* claim, there can be no controversy. It was the duty of Biemann & Co. to defend against the *Moody* claim in this action upon all the legitimate grounds they had and at their own expense. The statute so expressly provides. Sec. 3315, Stats. 1898.

Moody refused to come into this action till after it was fully tried, and the court then allowed him to file his complaint that had been served in an independent action against Biemann & Co. and *Farr* as his answer herein, and to recover according to his rights as shown by the testimony. That was objected to, and the permission should not have been granted except upon such terms as were necessary to save the rights of Biemann & Co. and of *Farr*. Such rights, however, may be fully protected and the error in that regard cured by allowing Biemann & Co. directly and *Farr* indirectly such damages as the evidence shows were caused to the former by *Moody's* fault.

A careful reading of the evidence leads to the conclusion that Biemann & Co. were delayed in their work, by *Moody's* breach of contract, for a considerable length of time. It is not deemed necessary here to review in detail the evidence bearing on the subject. Suffice it to say that the evidence has been examined with care and to our minds shows clearly that Biemann & Co.'s breach of contract, in that they did not finish the building till one month and twenty-three days after the time agreed upon, is accounted for to the extent of at least one month by *Moody's* failure to furnish the mill work as agreed upon, and that he should be charged, as damages, for the rental value of the building for that length of time, or $38, with interest thereon from the time of the breach.

It is claimed that none of the subcontractors' lien claims are lienable because their rights are referable to the rights of Biemann & Co., and that, as the company stipulated against incumbering the property by liens, the subcontractors must be held to have likewise stipulated. That claim is based upon the following provision of the contract: "It is understood and agreed that all money drawn on this contract shall be held in trust for the owner by the contractor, to be applied in payment of all claims for labor and ma-

terial which have already entered into the construction of the building and for which a lien might be filed against the premises, or for which the owner might be held responsible, and the owner hereby specially reserves the right to retain all moneys due upon this contract until the contractor shall furnish such evidence that all claims for labor and material, etc., which might be made against the owner for work embraced in this contract, for which a lien might be filed against the premises, have been satisfied." The proposition that the claim of the subcontractors is referable to the principal contract, and that if the principal contractor is not entitled in any event to a lien by reason of stipulating to the contrary, his subcontractors are bound by such stipulation, is well supported by authority. This court directly passed upon the question in principle in *Siebrecht v. Hogan*, 99 Wis. 437. It was there said, in effect, that a subcontractor's lien cannot, to the prejudice of the proprietor of the building, be extended beyond the scope of the principal contract. The subcontractor's authority to bind the principal depends upon the right of his principal to do so under the same circumstances. To that extent only the proprietor is deemed by force of the statute to have authorized the principal contractor to indirectly bind his principal under the lien laws of the state. The difficulty, however, with appellants' position is that the law does not fit the facts of this case. There is no stipulation here against the filing of liens upon the building. On the contrary, the contract expressly recognizes the probability of there being lienable claims, and stipulates that the money paid to the contractor shall be considered a trust fund for the discharge of such claims. Similar clauses in building contracts have been passed upon by courts, as conveying the very opposite idea from that of waiving the benefits of the lien statutes. Jones, Liens, § 1502.

A further claim is made that the liens were not enforce-

able since nothing was due the principal contractor except upon architect's certificates of satisfactory performance of the conditions of the contract, and the evidence does not show that such certificates were given or were produced upon the trial. We are unable to see how that is material. A subcontractor's lien is not dependent under our statutes upon whether there is anything due the principal contractor. If in any event a claim would be lienable under the principal contract in favor of the contractor, it is lienable in favor of his subcontractor, and the right in that regard cannot be impaired by any default of the principal contractor. It would be a strange doctrine under our lien statutes to hold that the neglect of the principal contractor to acquire the right to recover for constructing a building where it has actually been constructed and is in existence as an improvement upon the proprietor's land, will defeat the right of a subcontractor to look to the property for the payment of his claim.

Appellants' counsel refer with confidence to *Goodman v. Baerlocher*, 88 Wis. 287. The point there decided was that the calls of the statute for a building must be satisfied as a condition precedent to the existence of a lienable claim; that by the terms of the statute a mechanic's or materialman's lien can only be acquired on land or the interest of the owner of a building in land, in the event of there being a building thereon, in the construction of which such mechanic or materialman contributed labor or material as provided in the statute. In that view it was decided that where there is no building by reason of one partially constructed having been destroyed by fire there can be no lien either in favor of a contractor or subcontractor. All that is said in the opinion should be read with reference to the point so decided. The reference to *Malbon v. Birney*, 11 Wis. 107, where it was held that if there is nothing due the principal contractor so he can recover, no recovery can be had by a

subcontractor, was not necessary to a decision of the case. It was not strictly appropriate to the point discussed because such point did not turn on whether a principal contractor can enforce a lien for a partially constructed building, nor upon whether a subcontractor can have a lienable claim where there is nothing due the principal contractor, but on whether a lien can be enforced *where there is no building* within the meaning of the statute. When the *Malbon Case* was decided valid subcontractor's liens could not exceed the amount due the principal contractor. Not so now. Under the present statute, if the principal contractor keep within the scope of his contract in respect to the nature of labor and character of material put into the building by subcontractors, in that regard he is the accredited agent of his principal to incur the indebtedness for such labor or material regardless of whether he thereby exceeds the contract price to him for the building or whether the time or conditions under which such contract price is payable are indirectly varied. The language in the *Goodman Case*, that where "the principal contractor is not entitled to a lien for any other reason than that he has been paid in full, the subcontractor under him and the materialmen and laborers would not seem to be entitled to any lien," is misleading so far as it conveys the idea that circumstances other than payment that will defeat a lien as against a contractor will defeat it as against his subcontractor. Of course where a claim is not lienable in favor of the principal contractor it is not lienable in favor of the subcontractor; but, the lienability of a claim being established, a subcontractor's right to enforce it is not dependent upon whether the owner of the building might defeat it if the claim were made by the principal contractor.

Appellants' counsel urge the point that the court should have held that the bond running to Dohmen was made for the benefit of *Farr*, and that *Jones* and *Forster* were liable,

upon the well-recognized principle that if a person make a contract with another for the benefit of a third person the latter may enforce it against such other. The difficulty with that is not with the law but with the facts. We are unable to come to the conclusion that the trial court erred in holding that the intent of *Jones* and *Forster* was solely to contract for the benefit of Dohmen. Such is the letter of the bond, and no reason is perceived for disturbing the decision of the court that the paper should be given effect accordingly. The case of *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17, cited to support the contention that the bond, without reformation, should be regarded as a security for *Farr*, does not meet the situation. To render the case in point we would have to read into the bond in controversy an express agreement that *Farr* should have the right to maintain an action thereon against the sureties therein named, the same as if he were named as the obligor. There was such a stipulation in the bond involved in the cited case. We do not deem it necessary to further discuss the question, though counsel have cited to our attention many cases. None of them appears to be in point. When we reject, as we must, the premise counsel assumes, that the bond was given for the benefit of *Farr* though in terms it runs to Dohmen, all the authorities cited cease to have any bearing whatever on the controversy.

There are some other points discussed in the briefs of appellants' counsel. None of them seems to require any special mention in this opinion. All have been covered which in our view of the case can affect the judgment appealed from. The judgment as to plaintiff *Gustav Seeman*, and defendants *Forster Lumber Company*, *John J. Jones*, and *Charles G. Forster*, was correctly rendered and must be affirmed. The judgment as to defendant *Frank Moody* must be reduced by $80 and interest, in all $87.31, leaving the total amount of his recoverable claim and costs $415.45. *Otto*

Biemann, *John Bruening*, and *C. O. Koehler* should be credited with the amount of the correction of the judgment as to *Moody* and charged with $67.13 and interest from the time of the breach of the contract, July 15, 1897, to the date of the finding, as damages (*J. I. Case P. Works v. Niles & Scott Co.* 107 Wis. 9), in all $73.09, leaving a balance of $14.22, which should be deducted from the judgment awarded to the appellant against them, leaving such judgment to stand at $574.56, including costs.

By the Court.— The judgment of appellant as to *Biemann*, *Bruening*, and *Koehler* is reduced to $574.56. The judgment in favor of *Frank Moody* is reduced to $415.45. The judgment as a whole as so modified is affirmed. For the purpose of the taxation of attorneys' fees in this court, all of the lien claimants must be considered as one party and the appellants as one party (*Allis v. Meadow Spring D. Co.* 67 Wis. 17, 23) and no attorneys' fees be allowed to either party. Appellant is awarded judgment for clerk's fees and $25 for printing against respondent *Moody*, and judgment is awarded in favor of respondents *John J. Jones*, the *Forster Lumber Company*, *Gustav Seeman*, and *Charles G. Forster* for their disbursements for printing briefs. No other costs than as indicated are to be taxed in favor of any person interested in the appeal.

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108 382
113 *170

Wussow, Appellant, vs. Hase, imp., Respondent.

November 19 — December 7, 1900.

Contracts: Construction: Liability of surety: Parol evidence: Appeal: Immaterial error: Evidence.

1. One S. agreed to run a saloon and restaurant for plaintiff on premises leased by the latter, to purchase all goods thereafter needed in plaintiff's name, to pay all expenses and accounts of the business

excepting the rent, which was to be paid by plaintiff, and to pay to plaintiff $75 monthly. By a bond reciting such agreement and given to secure its performance by S., the defendant H. undertook to save plaintiff harmless from, "all bills, accounts, or obligations herein mentioned, *except rent.*" *Held:*

(1) H. was not liable to plaintiff on the bond for the stock on the premises, purchased from him by S. at the time the latter went into possession.

(2) The words "except rent," in the bond, construed in the light of the situation of the parties at the time it was executed, and of their acts under it, refer to the stipulated monthly payment of $75.

2. Parol evidence is inadmissible to show what the understanding of the parties was prior to the execution of a written contract, but where any of its provisions are ambiguous — as where the subject matter of an exception therein is not fully identified — extrinsic evidence is admissible to place the court in the position of the parties at the time the contract was executed, and also to show their acts under it, in order that the true meaning of the language used may be ascertained.

3. Where a cause is tried by the court, the admission of improper evidence will not work a reversal if there is sufficient competent evidence to support the findings.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

The plaintiff sues to recover the sum of $670.51, claimed to be his due upon a bond executed to him by the defendants, the condition of which is as follows: "The condition of this obligation is such that whereas the said *J. H. Wussow* has this day entered into an arrangement or agreement with the said John Slensby by the terms of which the said John Slensby is to run for him, the said *J. H. Wussow*, a saloon and restaurant in the premises known as No. 179 West Water street, in the city of Milwaukee, until the first day of May, 1896; the said John Slensby to purchase everything by way of stock necessary for said business for and in behalf of and in the name of the said *J. H. Wussow*, and to conduct said business by and in the name of the Commercial Sample Room at said place and during said time, and to pay

all expenses and accounts of said business (excepting the rent, which is to be paid by said *J. H. Wussow*), and to pay to the said *J. H. Wussow* the sum of seventy-five dollars for each and every month during the continuance of said agreement; the balance over and above such expenses and payments to be and belong to the said John Slensby as and for his salary or earnings on account of the performance of his duties as herein mentioned. And if the said John Slensby shall at all times during the continuance of this agreement keep and maintain the said place of business in a good and orderly manner for the said *J. H. Wussow*, and not in any manner conflict with any provisions of law, and shall from time to time comply with all the provisions of the agreement herein mentioned, then this obligation to be void, otherwise to be and remain in full force, virtue, and effect; the said *Henry Hase*, by way of penalty to this bond, to pay, and to hold harmless said *J. H. Wussow* from, all bills, accounts, and obligations herein mentioned, except rent." Of the amount claimed by plaintiff, $170.51 was for merchandise purchased of plaintiff by Slensby, and the remainder was the balance due on the $75 monthly payments mentioned in the bond.

The case was tried by the court without a jury. Upon the trial the court held that it could not be clearly gathered from the bond just what the words "except rent" referred to, and he admitted testimony showing the situation of the parties and identifying the payment to which they referred. The court found that plaintiff had rented the premises, with a covenant against subletting, and had taken out a saloon license, which would expire May 1, 1896. The business was not profitable. So, to avoid greater loss, and also to avoid possible trouble with his landlord, he entered into an agreement with Slensby to conduct the business in the name of plaintiff, and he (Slensby) was to pay him $75 per month as rent for the use of the premises. The bond was taken to

secure plaintiff from any loss that might occur from Slensby's purchasing goods for the business and not paying for them. The court further found that Slensby owed plaintiff $125 for goods he had purchased from plaintiff, which was not covered by the bond, and also the sum of $500, which was due on the monthly payments mentioned in the bond, which was for rent, and for which the defendant *Hase* was not liable. Judgment was entered in favor of plaintiff and against Slensby for the amounts above stated and interest, and in favor of defendant *Hase*, dismissing the action with costs. The plaintiff appeals from that portion of the judgment last mentioned.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas*.

For the respondent the cause was submitted on the brief of *Christian Doerfler*.

BARDEEN, J. Two questions are raised: (1) Is the defendant *Hase* liable to plaintiff on his bond, for the stock on the premises, purchased by Slensby from plaintiff at the time he went into possession? Was parol evidence admissible to enable the court to properly construe the contract of suretyship?

Concerning the first question there is little ground for debate. Slensby's engagement was to run the saloon and restaurant business for plaintiff, to purchase all goods thereafter needed in his name, and to pay all expenses and accounts. *Hase* undertook to save plaintiff harmless from all bills, accounts, or obligations mentioned in the bond. The goods turned over by plaintiff to Slensby are not mentioned. By a fair construction of the bond, *Hase* was only bound to save the plaintiff harmless from all bills or accounts which Slensby might contract in plaintiff's name to carry on the business. The first item sued for was clearly not within the terms of his undertaking.

As regards the second question, it is clear that any one reading the bond would be unable to identify with certainty just what item included therein was referred to in the exemption clause. No item that Slensby was to pay was specifically denominated rent. True, it appears that Slensby was to make stated monthly payments. Considering the context, the natural inference would be that Slensby was to pay the sum specified for the use of the premises. The evidence offered sets the matter entirely at rest. The court finds that these payments were to be for rent, and there is ample evidence to support it. The plaintiff seems to have so understood it, and his bills rendered to Slensby call for payments of rent. While on the stand as a witness he at first referred to it as rent, but later called it profits. It makes no difference, however, whether it be called rents or profits, if in fact it was rent and was so understood by the parties at the time the bond was drawn.

It is argued by plaintiff that parol evidence was not admissible to show what the understanding of the parties was prior to the execution of the bond. That is undoubtedly true, and very much of the testimony received by the court was inadmissible on that ground. But in a trial by the court the admission of improper evidence will not reverse the judgment if there is sufficient competent evidence in the case to support the findings. It is a cardinal rule in the construction of contracts that effect is to be given to all of the language used, if possible. The bond in suit attempted to fix and establish the liability of *Hase* to plaintiff. He was to pay all bills, accounts, and obligations mentioned, except rent. The words "except rent" must be construed to refer to something Slensby was to pay, else they would be meaningless. In that respect the bond is ambiguous. It is impossible to say with certainty to just what obligation mentioned to be performed by Slensby these words refer. In other words, the subject matter of

this exception is not fully identified. In such a case it was the duty of the court to place itself in the situation of the parties to the instrument, by means of extrinsic evidence, in order that the true meaning of the language used might be ascertained. It was also proper to receive evidence to identify the subject matter of the exception. Jones, Ev. § 455; 1 Beach, Mod. Law Cont. § 581. See *Hurley v. Brown*, 98 Mass. 545. Another aid to the court in ascertaining the fact in doubt was evidence of the acts of the parties under the contract. We think the evidence clearly shows that the exception mentioned referred to the stipulated monthly payments to be made by Slensby, and that the court's findings in that regard must be sustained.

By the Court.—The judgment is affirmed.

IN RE GUARDIANSHIP OF WELCH.

108 887
110 77

November 20 — December 7, 1900.

Guardianship: Mental incompetency: Appeal from county court: Notice: "Adverse party:" Costs: Evidence: Opinions of nonexperts: Advisory verdict: Immaterial errors.

1. Only with great hesitation should courts, by the appointment of a guardian, interfere with the discretion of elderly people, owing no legal duty of support to any one, in devoting the property accumulated by them to their comfort according to their own tastes.
2. If an appeal by an alleged incompetent person from an order of the county court appointing a guardian for him is taken before the guardian has qualified by giving bond as required by sec. 3981, Stats. 1898, service of notice of the appeal upon the attorney for the petitioners, in pursuance of an order of the court, is a sufficient compliance with sec. 4030 (requiring notice of appeal to be served on the *adverse party*), to give the circuit court jurisdiction of the appeal.
3. A proceeding for the appointment of a guardian being a "special proceeding," costs may be awarded against the petitioners under

subd. 7, sec. 2918, Stats. 1898 (providing that in "special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court." Sec. 2932 (providing for the payment of the costs out of the estate "in any *action* prosecuted or defended by an executor," etc.) applies to "actions" only.

4. Although, on questions of mental competency, a nonexpert witness who has related specific transactions with or conduct of the alleged incompetent may state by way of opinion the impression as to competency or incompetency conveyed to him by such conduct, the admission of such an opinion is largely discretionary with the trial court.

5. Errors in the instructions to the jury and in the form of the questions submitted for an advisory verdict are immaterial, where the finding of the court is sustained by the evidence, regardless of the verdict.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Petition for the appointment of a guardian of *Alfred H. Welch*, made originally by Eliza Murdock, a sister resident in Indiana, and one *Joseph A. Warren*, a friend, alleging said *Welch's* incompetence to manage his property by reason of his extreme old age, failing health, and mental inability. After trial the county court made an order appointing one Robbins as guardian, and providing that upon taking oath and filing bond letters of guardianship should issue to him. Before he had qualified, *Welch* filed notice of appeal, and the court ordered that the same be served upon the petitioners Eliza Murdock and *Joseph A. Warren* by serving a copy of the county judge's order and of said notice upon Frank B. Van Valkenburgh, their attorney, which service was accordingly made.

The case was tried in the circuit court with the aid of a jury, and the jury found, in response to a question, that said *Welch* was not, by reason of his extreme old age, failing health, and mental inability, incompetent to have the charge and management of his property. Various exceptions were taken to the admission and exclusion of evidence, to instruc-

tions to the jury, and to the refusal of the court to submit a question suggested by petitioner's attorney.

After the coming in of the verdict, but before filing findings, the petitioner *Warren* moved the court to set aside the verdict of the jury and to dismiss the appeal because the court had not jurisdiction, because the verdict was contrary to law and evidence, because of refusals to admit and to exclude evidence, and because of errors in the charge and errors in submitting and refusing to submit questions to the jury.

Thereafter the court filed its findings of fact to the effect that said *Welch* was not incompetent, but was fully competent to have the charge and management of his estate and of his own affairs, whereupon judgment was entered that the order of the county court be reversed, and the matter be remanded to that court with directions to dismiss the application on the merits, and in its discretion to award costs in that court in favor of *Welch* and against *Warren;* also for the recovery by *Welch* of and from *Warren* of the taxable costs in the circuit court. From that judgment said *Warren* appealed to this court.

Frank B. Van Valkenburgh, for the appellant, contended, *inter alia*, that the circuit court had no jurisdiction of this matter. The petitioner *Warren* never had any interest in the matter except to set the machinery of the court in motion. When the guardian was *appointed*, *Warren's* interest therein and connection therewith ceased. From that moment the guardian alone was the adverse party to the proceeding. Notice to *Warren* was of no avail to the guardian, and he has been discharged from his office as guardian without notice and without having his day in court. The circuit court should have dismissed the appeal. *Wheeler v. Hartshorn*, 40 Wis. 83, and cases cited; *Tryon v. Farnsworth*, 30 Wis. 582; *Rogers v. Shove*, 98 Wis. 271, and cases cited; *Thompson v. Ellsworth*, 1 Barb. Ch. 627; *Crowns v. Forest*

L. Co. 99 Wis. 105; *Appeal of Royston*, 53 Wis. 612, and cases cited; *Henk v. Baumann*, 100 Wis. 28; *Telford v. Ashland*, 100 Wis. 238, and cases cited; *State ex rel. Tallmadge v. Flint*, 19 Wis. 621, 623; *Nelson v. Clongland*, 15 Wis. 392; *Thompson v. Thompson*, 24 Wis. 515; *Appeal of Mullins*, 40 Wis. 154; *Perkins v. Shadbolt*, 44 Wis. 574; *Kasson v. Estate of Brocker*, 47 Wis. 79; *Betts v. Sholton*, 24 Wis. 306. The entry of judgment against *Warren* for costs in the circuit court was clearly erroneous. Secs. 2932, 3976, 3981, 3993, Stats. 1898; *Barbo v. Rider*, 67 Wis. 598, 607; 3 Witthaus & B. Med. Jur. 530, and cases cited; *Malone's Appeal*, 74 Pa. St. 481; Gary, Probate Law, § 937, and cases cited; *Ladd v. Anderson*, 58 Wis. 591; *Estate of Cole*, 102 Wis. 1, 12.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders*.

Dodge, J. 1. The general merits of this appeal present no difficulty. The conclusion of the circuit court that *Alfred H. Welch* was competent to manage his own affairs is not only not opposed to the great preponderance of the evidence, but overwhelmingly supported thereby. Had an opposite decision been reached, we think it could not have been sustained unless, perhaps, on the assumption that the appearance of *Welch* himself, not possible to present before us, negatived belief in his competency. We do not need to review the evidence, but perhaps should suggest that only with great hesitation should courts interfere with the discretion of elderly people, owing no legal duty of support to any one, in devoting the property accumulated by them to their own comfort according to their own taste.

The respondent here was applying the rents of his sixty-acre farm to secure to him thereon a home suited to his tastes, with people whose society he enjoyed, in whom he placed confidence, and toward whom he felt affection; a

home upon the farm which he had reclaimed from the wilderness, and which more than forty years of occupancy had endeared to him; one, too, where a life habit of industry might be indulged entirely in his own choice and manner. Against such considerations as these it matters not that, in the opinions of some neighbors, the reasonable rental value of the farm, added to the reasonable value of *Welch's* own labor, was greater than the reasonable charge for his board. If there were sentimental considerations connected with this home and this family which tended to enhance the comfort and happiness of this octogenarian, what higher wisdom could he have shown than to devote his income to the purchase of that happiness, although not worth the price in the opinion of others? The whole case shows this to have been the deliberate purpose of *Welch*, after some unpleasant experiments in other directions, and that, while his dealings with his tenant and friend Dougherty were characterized by some, perhaps unnecessary, liberality, he kept steadfast to his purpose to retain his sixty acres, now become a fortune variously estimated from $30,000 upward, and to make the income thereof supply his wants and comforts; a most commendable plan, which should not be interfered with without very clear evidence of mental incompetency to carry it out, which we do not find in the record.

2. It is contended by appellant here that the circuit court erred in refusing to dismiss the appeal to it on the ground of noncompliance with the statute requiring notice of appeal to be served on the adverse party. Sec. 4033, Stats. 1898. *Welch* gave to the county court notice of appeal, whereupon that court, in pursuance of its statutory duty, made order for service by delivery of copies of notice and order to Mr. Van Valkenburgh, as the attorney for petitioners, naming them, which order was complied with. Was the statute thus satisfied? Clearly, it is the policy that one adjudged incompetent have right of appeal. That right

must be exercised within a limited time. The person to whom notice is to be given must be one ascertainable within such time; nay, should be a person ascertainable at once, for, if the decision of the county court is wrong, control of property ought not to pass out of the owner, and immediate stay of proceedings should be possible. Who, then, within the contemplation of the statute, is adverse to the liberty and independence of the alleged incompetent at the time of the decision? Relator answers, the guardian. But there is no guardian at the moment. Sec. 3966, Stats. 1898, provides that, "before appointing any person guardian of a minor, the court shall require such person to give a bond," etc., which provision, by sec. 3981, is made applicable to guardians of incompetents. See somewhat analogous question as to executors, in *In re Will of Somervaill*, 104 Wis. 72. At the time respondent gave notice of appeal, Robbins had not qualified as guardian, and might never do so. He had a perfect right to decline to become adverse to *Welch's* autonomy. Until he had accepted and by bond bound himself to performance of the duties of a guardian, he was no fit person to represent such adverse interests. Obviously, until such acts on his part he was in no sense an adverse party. *State ex rel. Tallmadge v. Flint*, 19 Wis. 621, is not in conflict with this view, for that case holds that only after appointment *and qualification* the guardian represents the adverse interests. The situation in a guardianship proceeding is, of course, somewhat anomalous, for in one sense there are not two antagonistic sides to it. The person who by petition arouses the jurisdiction and duty of the county court may have nothing inimical in sentiment or interest to the alleged incompetent. He may be actuated purely by desire to benefit the latter or to protect the public at large. Nevertheless, he, by his own volition, assumes an attitude of practical antagonism to the freedom of the other, however benevolent his motives; and we perceive no reason why he

does not more nearly than any one else meet the statutory designation of the adverse party up to the time when a duly appointed and qualified guardian accepts that position and assumes its duties. The service of notice of appeal was sufficient.

3. Error is assigned for that the circuit court rendered judgment for costs against the respondent there, the appellant here; and sec. 2932, Stats. 1898, is invoked as requiring costs to be payable out of the estate involved, unless bad faith or mismanagement be expressly found. That position is supported by *Wiesmann v. Brighton*, 83 Wis. 550, and cases there cited, if the guardianship proceeding in circuit court is controlled by that section,—a question not yet decided by this court. Costs are the creature of statute, cannot be allowed in the absence of express statute, and, when such statute exists, must be allowed according to its terms. Ch. 129, Stats. 1898, controls the general question of costs in circuit courts. Therein we find sec. 2918, subd. 7, providing that "in all equitable actions and special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court." In the same chapter is sec. 2932, with the provision as to payment of costs out of the estate "in *an action* prosecuted or defended by an executor," etc. "Remedies in courts of justice are divided into: (1) Actions; (2) special proceedings." Sec. 2594, Stats. 1898. "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." "Every other remedy is a special preceeding." Secs. 2595, 2596. The application for appointment of a guardian is clearly a special proceeding. The distinction between actions and special proceedings has, with few exceptions, been preserved in the framing of our statutes; and when the legislature, in enacting our present revision, *ex industria* made

sec. 2918 include special proceedings, and refrained from so extending sec. 2932, the purpose to distinguish the scope of one from the other should be presumed, and the court should not give to the latter section an extension which the legislature withheld from it, but should apply it according to its words to actions only. No other statute is suggested by which the court had either duty or power to order costs awarded against the petitioner to be paid out of the estate. On the other hand, sec. 2918 expressly invested the court with discretion to allow costs in this proceeding against the present appellant, and no facts appear to warrant us in holding that discretion to have been abused.

4. Errors are also assigned upon the exclusion of the opinions of certain nonexpert witnesses as to *Welch's* competency. In all but one of such excepted rulings the only foundation laid was proof of acquaintance and familiarity. In one instance, however, a witness (Robbins), having related a lengthy conversation, was asked: "*Q.* Did you, from your conversation with him, based upon that, form an opinion as to whether he was competent, and had been, to do business?" Under the rule that on questions of mental competency a witness, though nonexpert, who has related specific transactions with or conduct of the alleged incompetent may state, by way of opinion, the impression as to competency or incompetency conveyed to him by such conduct (*Crawford v. Christian*, 102 Wis. 51; note to *Ryder v. State* [Ga.], 38 L. R. A. 721), the question to Robbins might well have been allowed; but its exclusion was not such error as to necessitate reversal. The admission of such opinions is largely discretionary with the trial court. *Boorman v. N. W. M. R. Asso.* 90 Wis. 144, 150. The conversation related by Robbins could have been of little aid in forming an opinion as to *Welch's* present competency or business capacity. It consisted of a narrative or history of his removal to Wisconsin when a young man, and of circumstances attending the

acquisition of his farm, more than fifty years old. The court might well have considered an opinion based thereon quite immaterial to the issue on trial, and have excluded it without abuse of discretion. Further, the acceptance in evidence of the opinion of this witness could have had no effect. It could not have aided the court, for the same history was related by *Welch* at least twice in its presence, and under circumstances of cross-examination and repetition such that the court's opportunity to draw conclusions therefrom was much better than any which the witness Robbins enjoyed.

The admission of opinions from two witnesses offered by *Welch*, upon somewhat doubtful foundation, must be held innocuous for the reasons above stated, as well as because, even if excluded, the whole evidence would still have been overwhelmingly in favor of the finding of competency.

Certain other rulings on evidence complained of by appellant may be passed without discussion, for, whether right or wrong, they are of but trifling materiality and could not have affected the decision.

Errors assigned upon certain instructions given to the jury and upon the form of the question submitted to them are immaterial, since the verdict of the jury was advisory merely, and the finding made by the court is fully sustained by the evidence regardless of that verdict. *Barbo v. Rider*, 67 Wis. 598, 607.

On the whole record, we are convinced that the decision appealed from was right.

By the Court.—Judgment affirmed.

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KRETSCHMAR, Appellant, vs. BRUSS and another, imp., Respondents.

November 20 — December 7, 1900.

Building contract: Alterations: Release of guarantors: Written direction: Finding: Presumption.

1. A building contract provided that alterations might be made in the plans and specifications, either by way of addition or deduction, without vacating the contract, and that the value thereof should be estimated and added to or deducted from the contract price. *Held*, that guarantors of faithful performance by the contractor were not released by reason of alterations which did not change the character of the building or unreasonably increase the expense.
2. Where a building contract prohibited the making of any changes or of any allowance therefor unless ordered in writing, and the trial court has found that certain changes were made by direction of the owner and his architect and an allowance made therefor by the architect, it will be presumed, in the absence of a finding to the contrary, that the direction for the changes was in writing.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an action on a contract of guaranty accompanying a building contract. In 1892 and 1893 the plaintiff, *Kretschmar*, as owner, erected a building upon certain lots owned by him in the city of Milwaukee, costing $11,500. The defendant Gross was the contractor for the carpenter work and hardware in said building, at the price of $3,733. His contract was in writing, and the defendants *Bruss* and *Wollaeger*, as sureties, signed the instrument of guaranty attached to the building contract, by which they guaranteed the faithful performance of said contract by Gross, and agreed to indemnify and save harmless the plaintiff against any liabilities, judgments, and mechanics' liens, costs, and expenses which might come against the plaintiff in consequence of the letting of said contract to Gross, or result from carelessness or neglect of Gross or his employees. This ac-

tion was brought to recover of Gross and his said sureties the amount of certain subcontractors' liens and the costs of foreclosing the same, which *Kretschmar* had been obliged to pay on account of the failure of Gross to pay them. The defense of the sureties, *Bruss* and *Wollaeger*, was that material changes had been made in the plans and specifications and in the building, by reason of which the sureties were discharged.

The action was tried by the court. There is no bill of exceptions. The court, after finding the execution of the building contract and the contract of guaranty, found that the building contract contained the following provision: "That in case any alterations should hereafter be made by order of the party of the second part or by direction of the said superintendent, by varying from the plans or specifications either by adding thereto or diminishing therefrom, or otherwise however, such alterations shall not vacate the contract hereby entered into, but such additions and deductions shall be estimated by said superintendent at their proper value and added to or deducted from the gross amount to be paid as above mentioned; provided, however, that no claim shall be recognized or allowance made unless the order for such shall be given in writing, and that no alteration shall operate to extend the time hereinbefore fixed, nor render void the contract for the completion of said work and the furnishing of said materials."

The court further found that the contractor, Gross, completed his contract, but failed and neglected to pay certain subcontractors and materialmen, and that said subcontractors and materialmen thereafter foreclosed mechanics' liens upon said building, which liens amounted in all, with the necessary costs and expenses, to the sum of $2,274.08; that the defendants Gross, *Bruss*, and *Wollaeger* refused to defend said action, though this plaintiff duly tendered them the right to defend; and that the plaintiff was obliged to expend the said sum of $2,274.08 to remove said liens.

The court further found that during the progress of said work alterations were made in the plans and specifications and in said building by the direction of the plaintiff and architect, which increased the cost of the building in the sum of $467, which said alterations were estimated and fixed by the architect and superintendent at such sum, and that the increase of the contract price by the amount so estimated by the architect as value of said extra work, changes, and alterations was such a change and alteration that it amounted to a material change of the contract, and so changed the position of the sureties to their prejudice that they should be released from their contract of suretyship, and that judgment should be entered in their favor dismissing this action as to the sureties, and that the plaintiff should have judgment only against the defendant Gross for the sum of $1,424.08, with interest, being the amount of said mechanics' liens, less $850 of the contract price which the plaintiff had retained in his hands.

Judgment was entered in accordance with these findings, and the plaintiff appeals from that part of the judgment which dismisses the action as to the sureties.

For the appellant there was a brief by *Julius E. Roehr* and *E. J. Dierks*, and oral argument by *Mr. Roehr*. They argued, among other things, that under the terms of this contract it was perfectly proper for the parties to make any reasonable changes and alterations which might be desired, as the building progressed, without in any manner releasing the sureties from their liability on their guaranty. *Young v. Young*, 21 Ind. App. 509; *Dorsey v. McGee*, 30 Neb. 657; *U. S. v. Freel*, 92 Fed. Rep. 299; *Consaul v. Sheldon*, 35 Neb. 247; *DeMattos v. Jordan*, 15 Wash. 378; *Hayden v. Cook*, 34 Neb. 670. The sum of $467 in excess of the price of the building as originally contemplated was not such a material increase over the contract price that the sureties should be released. *Consaul v. Sheldon*, 35 Neb. 247; *O'Rourke v.*

Burke, 44 Neb. 821; *Dorsey v. McGee*, 30 Neb. 657; *Ashenboedel v. Findlay*, 53 Mo. App. 256. A surety for the performance of a contract will be released from liability by a change or alteration of such contract without his consent only when such change is material and substantial. *Stephens v. Elver*, 101 Wis. 392; *Smith v. Molleson*, 148 N. Y. 241.

For the respondents there was a brief by *Austin, Fehr & Gehrz*, and a supplemental brief signed also by *C. W. Briggs*, and oral argument by *W. H. Austin*. They contended, *inter alia*, that the additional cost incurred, without a written order as stipulated, amounting as it did to fully one eighth of the entire contract price, was such a change of condition and modification of the contract as to release the sureties. *Cowdery v. Hahn*, 105 Wis. 455; *Stephens v. Elver*, 101 Wis. 392; Brandt, Suretyship & G. (1st ed.), § 338; Lloyd, Building, § 69; *Stillman v. Wickham*, 106 Iowa, 597; *Northern Light Lodge v. Kennedy*, 7 N. Dak. 146.

WINSLOW, J. The evidence not having been brought to this court by a bill of exceptions, the only question is whether the pleadings and findings sustain the judgment. *Wille v. Bartz*, 88 Wis. 424.

The findings show that both the building contract and the contract of guaranty were breached by failing to protect the plaintiff against subcontractors' liens. The court, however, relieved the sureties from liability because alterations had been made in the plans and in the building, which increased the contract price in the sum of $467. As will be seen by reference to the statement of facts which precedes this opinion, the building contract itself provided that alterations may be made in the plans and specifications, either by way of addition or deduction, without vacating the contract, and that the value of such additions or deductions shall be estimated by the superintendent and added to or deducted from the contract price, provided that the

order for such change shall be in writing. The sureties agreed to guaranty the performance of the contract as it stood. This provision was one of the essential parts of the contract. It was plain and unambiguous. By their agreement of guaranty they undoubtedly expressly recognized and approved all material parts of the contract and assented in advance to changes or alterations in the plans which might be ordered in writing and which were fairly within the meaning of the provision. *Hayden v. Cook*, 34 Neb. 670. Probably changes which would completely change the character of the building, as from a dwelling house to a shop, would not be "alterations" within the meaning of the contract; but that question is not now before us. No such changes are found to have been made. The court found that alterations which increased the original contract price ($3,733) by the sum of $467 constituted such an increase in the contract price as to be a material change of the contract, and hence released the sureties.

To this conclusion we cannot agree. The changes are not described, and not found to have been anything beyond or outside of the proper scope of the term "alterations" as used in the contract. The building evidently remained the same building in character as the one contracted for, with alterations increasing the expense. But it was contemplated and agreed that the expense might be increased by alterations; hence the mere increase of expense, at least to the amount here found, manifestly releases no one.

But it is said that the changes were made by oral direction, and not in writing, as provided by the contract. There is, however, no finding to this effect. The finding is that changes and alterations were made by direction of the plaintiff and his architect, and that the amount thereof was estimated at their proper value by the architect and superintendent, to wit, at the sum of $467. The necessary inference from this finding must be that the changes were ordered in

writing because the contract expressly prohibits the making of any change or the making of any allowance therefor unless the order be given in writing, and we cannot presume a violation of this provision which is not found. Upon the findings, the sureties should have been held liable equally with the principal.

By the Court.—That part of the judgment appealed from is reversed, and the action is remanded with directions to enter judgment against the sureties for the same amount for which the principal was found liable.

DURR, Appellant, vs. WILDISH, Assignee, and others, Respondents.

November 20—December 7, 1900.

Chattel mortgages: Invalidity as to creditors: Sales by mortgagor: Diversion of proceeds with consent of mortgagee: Pleading: Evidence.

1. A mortgage of a stock of merchandise permitted the mortgagor to sell and to make additions to the stock, but was silent as to the disposition to be made of the proceeds of sales over and above the additions. In a foreclosure action it appeared that sales were largely in excess of the additions; that only a small part of such excess was applied on the mortgage debt; and that the mortgagee knew the fact and made no objection. *Held*, that in the absence of any explanation the court might properly assume that the remainder of said excess was used by the mortgagor pursuant to some understanding, express or implied, with the mortgagee; and that by reason thereof the mortgage, even if valid on its face, was void as to creditors.
2. Where such an understanding between mortgagor and mortgagee exists, the fact that the mortgagee afterwards takes possession of the property does not validate the mortgage as against creditors.
3. Where the facts invalidating a chattel mortgage appear from the complaint in a foreclosure action and from evidence admitted without objection, they sustain a finding of such invalidity, even though no such issue was tendered by the answer.
4. In an action to foreclose a chattel mortgage the fact that the mortgagor had other creditors is properly shown by the record of a

voluntary assignment by the mortgagor, showing the filing of claims against him which were not objected to,—the plaintiff having become a party to the assignment proceedings by filing his claim secured by the mortgage, and having contested the right of the assignee to possession of the mortgaged property.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

On April 30, 1896, Adolph Landau gave the plaintiff a chattel mortgage to secure the payment of four notes of $625 each, due November 1, 1896, May 1, 1897, November 1, 1897, and May 1, 1898. This mortgage covered a stock of crockery and other merchandise and trade fixtures. It was duly filed May 4, 1896. It contained the following clause: "The mortgagors shall have the right to sell the goods covered by this mortgage, and add to the stock by purchasing other goods." The mortgagor remained in possession, and sold goods, and made additions to the stock as follows: Sales, $6,690.53; additions, $4,423.36. During this time he paid the first note and interest on the other notes to January 30, 1897, in all about $765, leaving a trifle over $1,500 unaccounted for, and which he used for other purposes. He attempted to file statements as required by ch. 241, Laws of 1887, but it is admitted that such statements were not in compliance therewith.

The mortgage was in fact owned by the German-American Bank, the plaintiff being its trustee. The mortgagor remained in possession, and continued to make sales, until December 9, 1897, at which time plaintiff claims the representatives of the bank took possession. This is denied by defendants. The evidence shows that possession was contested, both parties claiming possession, until December 13th, when Landau made a voluntary assignment for the benefit of his creditors to the defendant *Wildish.* The latter attempted to take absolute possession, but was ejected by the plaintiff's representatives. The matter got into court, and possession of the property was eventually given the as-

signee. See *Durr v. Wildish*, 100 Wis. 411. By stipulation of the parties the property was sold by the assignee, and the proceeds were to stand in lieu of the property, and are now held by the assignee. The plaintiff brings this action to foreclose said mortgage and to secure such proceeds.

The court made findings at great length on the question of possession, and concluded that the mortgage was valid as to the fixtures, and void as to the other property, by reason of the failure of Landau to comply with the provisions of the statute. Judgment was entered for plaintiff for the value of the fixtures, and for the defendants as to the remainder of the proceeds. The plaintiff brings this appeal from that part of the judgment which adjudges that the assignee is entitled to hold a part of said proceeds.

For the appellant there were briefs by *Hoyt & Olwell*, and oral argument by *L. A. Olwell*. To the point that, the plaintiff having taken possession of the stock of goods under the authority given him in the mortgage before his right to do so was revoked by the mortgagor, his title was perfectly good, they cited *Chynoweth v. Tenney*, 10 Wis. 397; *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207; *Single v. Phelps*, 20 Wis. 398; *Roundy v. Converse*, 71 Wis. 524; Jones, Chattel Mortgages, § 178, and cases cited in note 7; *National Bank v. Bryden*, 80 N. W. Rep. 276.

For the respondents there was a brief by *W. J. & J. H. Turner*, and oral argument by *W. J. Turner*.

BARDEEN, J. The mortgage in suit contained the following provision: "The mortgagors shall have the right to sell goods covered by this mortgage, and add to the stock by purchasing other goods. It is especially agreed that this mortgage shall and does cover such after-acquired property." Further than as above stated, no provision was made regarding the disposition of the proceeds of such sales. The complaint and the evidence show that while the mortgagor was in possession he sold goods to the amount of $6,690.53,

and expended $4,423.36 in additions to the stock; that during this period he had paid about $765 on the mortgage debt, leaving over $1,500 wholly unaccounted for, even if he paid for all additions to the stock,—a fact not shown.

A mortgage which permits the mortgagor to remain in possession of the mortgaged property, and to sell it and apply the proceeds, partially or wholly, to his private use, is void as to creditors. *Place v. Langworthy*, 13 Wis. 629; *Blakeslee v. Rossman*, 43 Wis. 116. The same is true if the mortgage is given with the understanding, express or implied, that the mortgagor shall go on selling the property in the usual course of trade, applying the proceeds to his own use. *Anderson v. Patterson*, 64 Wis. 557; *Bank of Kaukauna v. Joannes*, 98 Wis. 321; *Charles Baumbach Co. v. Hobkirk*, 104 Wis. 488. Where any such understanding exists, the fact that the mortgagee has taken possession of the property does not validate it in a contest with creditors. *Blakeslee v. Rossman, supra.* It is probable that since the passage of ch. 241, Laws of 1887, and in view of the decision in *Roundy v. Converse*, 71 Wis. 524, a mortgage which permits the mortgagor to sell the property and make additions to the stock, and does not make express provision as to the application of proceeds, might be held valid where statements were filed as required by the statute. But in this case it is admitted that no such statements were filed as were required by the statute.

The record shows that the mortgagor was left in possession, and was permitted to make sales; that over $1,500 of such proceeds were applied to his personal use. There is no allegation that it was so applied contrary to any agreement or understanding of the parties. The inference is that it was so used by the mortgagor in accordance with some agreement. If such agreement existed, the mortgage was absolutely void as to creditors; and the fact—if it is a fact—that the mortgagee afterwards took possession did not change the situation. *Charles Baumbach Co. v. Hobkirk*, 104

Wis. 488. When, in such a case, the mortgage is silent as to the disposition of the proceeds of sale made by the mortgagor over and above the additions to the stock, the law would presume that such proceeds were to be applied in satisfaction of the mortgage debt. But when the complaint and the evidence show sales largely in excess of the additions, and an application of only a small portion of such excess upon the mortgage debt, to the knowledge of the mortgagee, the court will be justified in assuming that the remainder was used by the mortgagor pursuant to some understanding, express or implied, with the mortgagee. No objection seems to have been made by the mortgagee to the policy pursued by the mortgagor. The bank was the actual owner of the mortgage. Its officials knew the facts, as a portion of the money was checked out through the bank. Mr. Pullen, the cashier, was frequently in the store. He is presumed to be familiar with the transactions of the bank. There is no pretense that the parties were not familiar with the transactions alleged in the complaint. No explanation is offered or reason given why the balance of sales over additions was not applied to reduce the mortgage debt. Admitting that the mortgage was valid on its face, if the agreement mentioned existed the inevitable tendency and effect of the mortgage was to hinder and delay the collection of debts against the mortgagor. *Anderson v. Patterson*, 64 Wis. 557; *Bank of Kaukauna v. Joannes*, 98 Wis. 321.

But it is said no such issue is tendered by the answer. That is true, but very many of the facts mentioned appear on the face of the complaint. Considerable of the testimony came in without objection. During the trial testimony was offered by defendants as to the removal of some of the stock at one time to another store. This was objected to by plaintiff as not being within the issues raised by the pleadings. The court admitted it "for the purpose of showing that upon the grounds alleged in the answer the mortgage was void, and for the further purpose of determining

who had the possession of the goods from and after the 9th of December, 1897, and for no other purpose." The record further shows that, as some of the testimony bearing upon the disposition of the proceeds of sales by the mortgagor was being offered, plaintiff's counsel remarked to the court, "All under the same limitation," to which the court made no response. It is needless to say that such an objection is insufficient. Substantially all of the evidence bearing upon the fact last suggested came in without any proper objection thereto. The evidence is in the case, which, with the facts set out in the complaint, is sufficient to sustain the conclusion reached by the trial judge that the mortgage was void as to creditors, although he put it upon other grounds.

It is further argued that there was no proper evidence that the mortgagor had other creditors. The evidence on that point was the record of the proceedings in the voluntary assignment made by the mortgagor December 13, 1897. This record showed claims filed to the amount of $4,978.28, and that $2,244.28 of claims were not objected to. This included plaintiff's claim now in suit. The plaintiff had become a party to the assignment proceedings, and had had a contest with the assignee as to the possession of the property, which came to this court. *Durr v. Wildish*, 100 Wis. 411. We see no good reason why such record was not properly admissible to establish the amount of the mortgagor's indebtedness.

The view we have taken of the case renders it unnecessary to discuss the question whether plaintiff's alleged possession of the mortgaged property was forcible or not. We are convinced that the record shows that the mortgagor was selling goods and applying a portion of the proceeds to his own use pursuant to some agreement with the mortgagee which rendered the mortgage void as to creditors.

By the Court.—The portion of the judgment appealed from is affirmed.

CASES DETERMINED

AT THE

January Term, 1901.

WEBSTER, Respondent, vs. PIERCE and others, Appellants.

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September 26, 1900 — January 8, 1901.

Ejectment: Disclaimer: Judgment, upon whom binding: Lis pendens: *Unrecorded conveyance: Tax titles: Limitations: Commencement of action.*

Pierce and Killen obtained and recorded tax deeds of wild and unoccupied lands which so remained for more than three years thereafter. Pierce conveyed to Killen and Killen to Markham, neither deed being recorded till after the statute of limitations ran in favor of the tax deeds. Webster, the former owner, seasonably commenced an action of ejectment against the original tax-title claimants, relying upon the record title. They answered by a full disclaimer and informed plaintiff where the tax title lay. After the expiration of the period limited by law for the commencement of an action to avoid the tax deeds, the complaint was amended by making Markham and his vendee, the Northern Wisconsin Land Company, parties defendant. Markham answered by a full disclaimer and the land company by setting up the statute of limitations. A notice of the pendency of the action was filed at first. It was admitted that the tax titles were void unless made good by the running of the statute of limitations. The disclaimers were not falsified. Judgment was rendered against all of the defendants in favor of plaintiff. *Held:*

1. If a defendant in ejectment answer by a full disclaimer and the answer be not falsified, he is entitled to a judgment dismissing the action with costs; though the judgment is nevertheless conclusive of plaintiff's title against the defendant and all persons claiming under him by title acquired subsequent to the filing of

the notice of the pendency of the action in the office of the register of deeds of the proper county.

2. The status of the owner of a tax title to unoccupied land, created by the tax deed and record thereof, as regards being liable to an action of ejectment by the former owner if the tax deed be void, is destroyed as to him by the conveyance of the tax title to another, though such other do not place his deed upon record.

3. The general statute, sec. 3187, Stats. 1898, regarding the filing of notices of *lis pendens* in actions affecting title to real property, does not apply to actions of ejectment, such actions being governed by sec. 3088.

4. The owner of land by title acquired of the defendant in an action of ejectment prior to the commencement of such action and held under an unrecorded deed is not bound by the judgment therein against such defendant, though a notice of the pendency of the ejectment action be filed under sec. 3187, Stats. 1898. Such judgment only binds the defendant and all interested in the subject of the action by title acquired from the defendant subsequent to the filing of the notice of the pendency thereof, as provided in sec. 3088.

5. Under secs. 4239, 4240, Stats. 1898, a person not a party to an action as originally brought, but then possessed of an independent right in the subject thereof, cannot be bound by the filing of a notice of the pendency of such action under sec. 3187, as regards the right to the benefit of the statute of limitations, it being provided in the section first mentioned that an action shall be deemed commenced as against a defendant, as regards any statute of limitations, when the summons shall have been served upon him or a defendant united with him in interest or there has been a *bona fide* attempt to make such service by delivery of the summons to the proper officer for service with the intention that it shall be served.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Action of ejectment. The complaint is in the usual form. The action was originally commenced against defendants *C. S. Pierce* and *William H. Killen.* The complaint was duly filed April 13, 1893, and on the same day a *lis pendens* was filed in due form. The summons was served on said

defendants April 14, 1893. They appeared by attorney May 3, 1893, and answered July 12, 1893, disclaiming any interest in the land and denying that at the time of the commencement of the action, or for a long time prior thereto, they were in possession of or claimed any interest in the subject of the action, and alleging that *Robert H. Markham*, before the action was commenced, by a quitclaim deed from them, became the owner of all the interest they ever had in the property, and that he or his grantee was the owner thereof. October 15, 1898, an amended summons and complaint, which included said *Markham* and the *Northern Wisconsin Land Company* as defendants, were served on them. December 21, 1898, such new defendants served separate answers, that of the land company putting in issue all the allegations of the complaint, pleading title in defendants under three tax deeds and the three-years statute of limitations (sec. 1188, Stats. 1898) as to said deeds. The answer of defendant *Markham* put in issue the allegations of the complaint, disclaimed any title in himself, and alleged that whatever title he ever had to the property was conveyed to the land company September 24, 1898, and prior to the time he was served with the summons in the action.

The cause was tried by the court and resulted in findings of fact by agreement of the parties as to their relations to the action and the serving and filing of papers therein, in accordance with the foregoing, and further findings by agreement as follows:

An amended *lis pendens*, corresponding to the amended summons and complaint, was duly filed October 14, 1898. Plaintiff is the owner and entitled to possession of the land in question, unless the fact is otherwise by reason of three tax deeds covering the lands, which, on May 19, 1890, were in due form of law made to the defendants *Pierce* and *Killen* and on the same day duly recorded in the office of the register of deeds of Langlade county, the county where the

lands lay, said tax deeds being based on the tax sale made by the treasurer of said county May 18, 1887. All the lands are, and always have been, wild and unoccupied. April 1, 1891, defendant *Pierce*, by quitclaim deed, which was duly recorded May 26, 1893, conveyed his interest in the lands to defendant *Killen*. April 3, 1893, *Killen*, by quitclaim deed, duly recorded June 5, 1893, conveyed his interest in the land to defendant *Markham*, who, on September 24, 1898, conveyed such interest to the defendant land company. Defendant *Killen*, May 15, 1898, paid Langlade county $65.71 for the certificates on which the tax deeds were based, and May 15, 1898, he paid the costs of obtaining and recording the deeds, $11.94. Until the recording of the quitclaim deeds mentioned, plaintiff was ignorant of any change in the tax-deed title from the grantees mentioned in such deeds, and relied entirely upon the record title, which did not disclose any such change. The tax deeds, unless cured by the statute of limitations pleaded, are void for irregularities not affecting the assessment or groundwork of the tax upon which the deeds are based. The amount for which the lands were sold at the tax sale, together with the costs of obtaining and recording the tax deeds and interest thereon at fifteen per cent. per annum from the time of the payment thereof by the original tax-deed claimants, down to October 7, 1899, is $209.47.

Upon such facts the court decided that plaintiff was the owner and entitled to possession of the lands described in the complaint; that defendants *Pierce* and *Killen* asserted title thereto when the tax deeds were recorded, and that their situation in that regard was not changed until after the commencement of the action; that the action was properly commenced against *Pierce* and *Killen* because a claim of title under the tax deeds was asserted by them so far as disclosed by the record at the time of such commencement; that the conveyances whereby the tax-title claim to the land

was finally vested in the land company not having been recorded till after the *lis pendens* was filed in the action, all parties in the chain of title reaching to the land company, and said land company, are purchasers subsequent to the filing of the *lis pendens*, and bound by the result of the action accordingly; that plaintiff is entitled to judgment upon condition of his paying to the land company the sum of $209.47, less the six cents damages allowed him, and interest thereon at the rate of six per cent. per annum from the date of the findings, within ninety days from such date, and that if such condition be not complied with defendants should have judgment. A conditional order for judgment was entered in accordance with such decision. Plaintiff complied with the condition, and thereupon judgment was entered in his favor against all the defendants, from which this appeal is taken.

Geo. W. Latta, for the appellants.

For the respondent there was a brief by *Geo. G. Greene*, counsel, and oral argument by *Mr. Greene* and *Mr. W. H. Webster*.

The following opinion was filed October 12, 1900:

MARSHALL, J. This appeal, as to appellants *Pierce* and *Killen*, is ruled by *Sherman v. Bemis*, 58 Wis. 343, and *Webster v. Killen*, 99 Wis. 525. It was decided in the first of such cases, and affirmed in the second, that if a defendant in ejectment neither has nor claims to have any interest in the subject of the action or any possession thereof actually or constructively at the time of the commencement of the action, he is entitled to a dismissal thereof with costs. In the *Webster Case* it was held, as to unoccupied lands, that the situation of the grantee in a recorded tax deed, as regards being in the constructive possession of the property covered by it, claiming title thereto, and in such circumstances liable to an action of ejectment if the tax deed be void, is destroyed

by such grantee conveying his tax-title interest to another before suit brought, regardless of whether such other places his deed on record or not. Both cases hold that, if a defendant in ejectment answer that he parted with all right, title, and interest in the subject of the action prior to the commencement thereof and is neither possessed of nor claims any interest in the property, the only issues to be litigated are whether the allegations of the answer are true. The cases follow the law as long settled and as laid down in the books as elementary. "A disclaimer is a renunciation of the title and right of possession. If not falsified it defeats the action. But the demandant is thereupon entitled to the possession of the land, and the party pleading the disclaimer is forever estopped by the judgment from denying his right of possession. If, however, the plea is falsified, the tenant is bound nevertheless, and the demandant may have judgment against him. The judgment upon a disclaimer, whether for or against the demandant, is conclusive in his favor upon title, as between the parties." Newell, Ejectment, 812, § 4.

From the foregoing it must be seen that the judgment against *Pierce* and *Killen* is erroneous. Both disclaimed having any title or claim of title or possession of the property in dispute, and their answer, upon such points, was not falsified.

It is claimed that, under the *lis pendens* statute (sec. 3187, Stats. 1898), hereafter to be considered, and the rule as to the status of the grantee in tax deeds as regards the former owner of the property, the elementary principle referred to does not apply. It is not deemed necessary, however, at this time, to rediscuss the whole question. It seems to be fully covered by *Webster v. Killen*, *supra*, and the principle of the *Sherman Case*. The law for this state has been settled for too long a time to be now changed in a matter so involving property rights, without more weighty reasons for it than have been presented by counsel or discovered by our own inves-

tigations, even if doubts were to exist whether the same result would be reached if we were so circumstanced as to be able to view the subject unhampered by previous adjudications. The judgment against *Pierce* and *Killen* was based on the conclusion of law made by the trial court that their status, as regards the subject of the action, created by the taking and recording of the tax deed, was not changed prior to the commencement of the action, because the record title to the property was not changed. We must hold that such conclusion, and the judgment to which it led, are erroneous.

What has been said necessarily requires a reversal of the judgment as to appellant *Markham*, as the findings of fact show that he parted with all claim to the property before he was called upon to defend in the action.

The question left for consideration is, Is the defendant *Northern Wisconsin Land Company*, *Markham's* grantee, bound by the judgment from the time of the commencement of the action, because *Markham's* deed was not placed upon record, by force of the *lis pendens* statute (sec. 3187, Stats. 1898)? Counsel for respondent claim that for all the purposes of the action the holders of the record title, *Pierce* and *Killen*, represented the title in fact, because of the *lis pendens* statute, which provides that, "In an action affecting the title to real property, . . . from the time of the filing of the *lis pendens*, the pendency of such action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; and every purchaser or incumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or incumbrancer and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto." It cannot be doubted but that such language, in its literal reading, includes actions in ejectment. Our attention is called to the fact that it was borrowed from New York in 1867 and that, though it was not construed

there as applying to actions of this kind, before such adoption nor thereafter, it was, as early at least as 1866, referred to in some cases in such a way as to indicate that its application was intended to be as broad as the literal sense of the words indicates. *Stern v. O'Connell*, 35 N. Y. 104; *Ayrault v. Murphy*, 54 N. Y. 203; *Lamont v. Cheshire*, 65 N. Y. 30; *Kursheedt v. Union D. S. Inst.* 118 N. Y. 358. It is significant, however, that no New York adjudication has been called to our attention by counsel, or discovered otherwise, where it has been held that the actual owner of property under an unrecorded deed can be bound by a judgment in ejectment against his grantor merely from the fact that the record title was in such grantor at the time of the commencement of the action and a *lis pendens* was placed on file before the deed of the secret owner was placed on record. While *Lamont v. Cheshire, supra*, was an action in ejectment, it did not involve the effect of the filing of a notice of *lis pendens* in such an action. The *lis pendens* there considered was filed in an ordinary action to recover a debt where real estate is attached under the New York Code.

It would seem, independent of authority, that the effect of a judgment of ejectment in New York, notwithstanding the general provision regarding the filing of a notice of *lis pendens* in an action affecting real estate (sec. 132, p. 486, 3 Banks & Bros.' R. S., 6th ed.), which provision is substantially the same as ours, is governed by the special provision on the subject (sec. 32, p. 576), which reads as follows: "Every judgment in an action of ejectment rendered upon a verdict of a jury, or a report of a referee upon the facts, or upon the decision of a single judge upon the facts, shall be conclusive as to the title established in such action, upon the party against whom the same is rendered, and against all persons claiming from, through, or under such party, by title accruing after the commencement of such action." It will be seen that the special and general provisions are di-

rectly in conflict if each can be said to apply to the same thing, hence, by a very familiar rule of statutory construction, the special governs the general provision, the presumption of law being that it was the legislative purpose to make an exception to that effect. But the New York court seems to have passed upon the question in *Sheridan v. Andrews*, 49 N. Y. 478, which we apprehend was not discovered by counsel either for appellants or respondent in their study of this case and the preparation of it for presentation to this court, else some attention would have been paid to it by them. That was an action of ejectment, and the question was raised of whether a purchaser of the subject of the action *pendente lite*, there being no notice of *lis pendens* on file pursuant to the general *lis pendens* statute relating to actions affecting the title to real estate, was bound by the judgment. The court decided in the affirmative on the ground that the effect of the judgment was governed wholly by the special statute regarding the effect of judgments in ejectment; that by such statute such a judgment reaches all titles acquired from, through, or under the defendant subsequent to the commencement of the action; that compliance with the provisions of the *lis pendens* statute, in order to protect the plaintiff against the conduct of the defendant pending the action, was unnecessary. The court used the following decisive language: "It is difficult to see how, in an action of ejectment, a notice of *lis pendens* can be necessary to bind even purchasers *pendente lite* by the judgment. The statute is explicit that the judgment shall bind all persons claiming under the defendant by title acquired after the commencement of the action." True, the precise point to which the quoted language refers was not necessarily involved in the case; but the general question of the effect of a judgment in ejectment was under consideration, and it is fair to conclude that the quoted language shows clearly the views of the New York court upon such point. It should be noted

that the *lis pendens* feature of our sec. 3088 is not found in the New York statutes.

There are found in the decisions of this court, as in those of New York, expressions regarding the general *lis pendens* statute that would indicate, if sec. 3088, Stats. 1898, were left out of view, that such statute is considered to have general application according to the literal sense of the words. Counsel for appellants called our attention to instances of that kind — *Coe v. Manseau*, 62 Wis. 81, and *Cutler v. James*, 64 Wis. 173,— but it will be noted that the question now under consideration was not raised in either of those cases. The *lis pendens* to which the remarks of the court were directed in one case was in an action to foreclose a mortgage, and in the other an action to remove a cloud on the title to real property.

So the question for consideration comes down to this: Are actions in ejectment excepted from the general language of sec. 3187, Stats. 1898, by sec. 3088? The one says that in an action affecting the title to real property, from the time of the filing of the *lis pendens* "the pendency of such action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby; and every purchaser or incumbrancer whose conveyance or incumbrance is not recorded or filed shall be deemed a subsequent purchaser or incumbrancer and shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto;" the other, that "every judgment rendered in any such action [an action of ejectment] shall be conclusive as to the title established therein upon the party against whom it is rendered and upon all persons claiming from, through or under him by title accruing after the filing of a notice of the pendency of the action in the office of the proper register of deeds," etc. Up to 1878 the latter section was similar to the law of New York, referred to in *Sheridan v. Andrews*, 49 N. Y. 478. In

the revision of that year the *lis pendens* feature was added, not, as it appears by the revisers' notes, for the purpose of extending, but of limiting, the scope of the section. They remarked, in substance, that the old statute was good enough when first enacted, because then actions of ejectment were commenced by declaration, the filing of which furnished some means of acquainting a subsequent purchaser with the pendency of the action; but that under the Code the action is commenced by summons, without anything necessarily appearing of record to show that an action has been commenced; that in view of the changed method of procedure, the effect of a judgment in ejectment should date only from the time some public notice, accessible to purchasers, is given. That, so far as it is entitled to weight, indicates that the purpose of the amendment was to regulate actions of ejectment, as regards persons not named as defendants, wholly by sec. 3088. The *lis pendens* feature was added eleven years after the change was made in sec. 3187 extending the effect of the filing of a notice of *lis pendens* to persons claiming title to the subject of the action under unrecorded deeds.

Now, if we look at the situation as it existed before the change in sec. 3088, we must say, as indicated by the New York court, that actions of ejectment, by such section, were excepted out of the general *lis pendens* provision, under the familiar rule of statutory construction, that where there is a general statute covering a class, and a particular statute covering a particular member of such class, the latter will prevail, upon the legal presumption, that obtains in the absence of a clear indication to the contrary, that it was the legislative purpose to except the particular matter from the general class. *Mason v. Ashland*, 98 Wis. 540; Maxwell, Interpretation of Statutes, 232. If we could say, but we cannot, that the general language of sec. 3187 was originally intended to cover sec. 3088, then, as the amendment to

the latter is clearly repugnant to the former as regards the owners of land under unrecorded deeds, the conclusion must be that the law of 1878 amends, by implication, sec. 3187. In any event it seems that the effect of a judgment in ejectment is governed wholly by sec. 3088. If that was not the situation prior to the amendment of the section in 1878, such amendment certainly had that effect. So, a judgment in ejectment, by the plain letter of the statute, does not reach further than the defendant and "persons claiming from, through or under him by title accruing after the filing of the notice of the pendency of the action in the office of the proper register of deeds."

There is a further limitation upon the effect of sec. 3187. While that provides generally who shall be deemed purchasers from the defendant subsequent to the commencement of the action for all general purposes, secs. 4239, 4240, Stats. 1898, provide specially for the circumstances under which a person shall be affected by limitation statutes, to the effect that an action shall not be deemed commenced as to any defendant for the purposes of such statutes, till the summons has been served on him or there has been an attempt to make such service in the manner there pointed out. It was held in *Levy v. Wilcox*, 96 Wis. 127, that a person so circumstanced that his right, at the time of the commencement of the action, is not dependent upon that of the defendant, is not bound by such action, as regards any statute of limitations, till he is brought into the action by amendment and there has been a service or attempted service of the summons upon him. No reason is perceived for changing the rule as there laid down. When an action is commenced against a person, the limitation statute as to such action, as regards the cause of action, is thereby interrupted and such person cannot transfer to another, having actual or constructive notice of the action, a better right than he himself possesses; but the interruption of the running of the

statute as to such cause of action will not affect the relations between the plaintiff and a person not a party to the action whose right, at the time of the commencement thereof, is independent of that of the defendant. Such a person can no more be affected by the commencement of the action, as regards the statute of limitations, than can a person joined as a defendant with another with whom he is not united in interest, be affected by the mere service or attempted service of the summons upon such other. That is the obvious effect of secs. 4239, 4240, Stats. 1898.

In view of the fact that it was, in effect, stipulated and found in the action that plaintiff's title was effectually divested by the tax titles owned by the *Northern Wisconsin Land Company* if the statute of limitations upon the right to avoid such titles, as to such company, had run in favor of such titles before the action was commenced as to such company, it follows from what has been said that the judgment appealed from must be reversed as to all appellants and that the cause must be remanded with directions to render judgment dismissing the complaint with costs in favor of all of the defendants.

By the Court.— So ordered.

CASSODAY, C. J., took no part.

The respondent moved for a rehearing.

For the appellants there was a brief by *Geo. W. Latta*, and for the respondent a brief by *W. H. Webster*, *per se*, and *Geo. G. Greene*, of counsel.

The motion was denied January 8, 1901.

WEBSTER, Respondent, vs. MOORE and others, Appellants.

September 26, 1900—January 8, 1901.

Webster v. Pierce, ante, p. 407, followed.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Appeal from a judgment rendered in plaintiff's favor against all of the defendants in an action of ejectment. The pleadings and facts are similar to those in *Webster v. Pierce, ante*, p. 407, and the questions of law presented by the appeal are the same. The actions differ only in the parties defendant, the lands involved, the date of the tax deeds, and some other matters not material to the legal questions upon which the appeal turns.

Geo. W. Latta, for the appellants.

For the respondent there was a brief by *Geo. G. Greene*, of counsel, and oral argument by *Mr. Greene* and *Mr. W. H. Webster*.

The following opinion was filed October 12, 1900:

MARSHALL, J. This case is ruled in appellants' favor by the decision in *Webster v. Pierce, ante*, p. 407. We refer to the opinion there instead of rediscussing the points decided.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment for the defendants dismissing the complaint with costs.

CASSODAY, C. J., took no part.

The respondent moved for a rehearing.

For the appellants there was a brief by *Geo. W. Latta*, and for the respondent a brief by *W. H. Webster, per se*, and *Geo. G. Greene*, of counsel.

The motion was denied January 8, 1901.

MILES, Respondent, vs. MUTUAL RESERVE FUND LIFE ASSOCIATION, Appellant.

October 30, 1900 — January 8, 1901.

108	421	
108	581	
108	421	
109	274	
108		421
112		[3]625
112		[4]671
56	LRA	236
56	LRA	237
108		421
114		[5]524

(1–5) *Life insurance: Benefit association: Nonpayment of assessment: Forfeiture: Burden of proof: Pleading: Authority to make assessment: Receipt after forfeiture: Waiver: Making subsequent assessment.* (6, 7) *Champerty: Purchase by attorney of claim in suit: Pleading.*

1. A benefit association claiming that a membership certificate has been forfeited by failure to pay an assessment must show affirmatively that the assessment was imposed in strict accordance with the insurance contract.
2. Under the liberal rules, prevailing in this state, for the construction of pleadings, an allegation in an answer that an assessment was duly made sufficiently states that the conditions existed, and were properly so found, upon which the right to make the assessment depended, and that the assessment was made by proper authority.
3. The constitution of a benefit association provided that on certain fixed dates, or at such other dates as the board of directors might determine, an assessment should be made on the entire membership for such sums as the executive committee might deem sufficient to meet the existing claims by death. *Held:*

   (1) Action by the board of directors was not required except in fixing the time for making an assessment where it was to be made at a date other than one of the dates fixed by the constitution; and where the time had been so fixed the executive committee had power to make the assessment.

   (2) The power of the executive committee was not limited to making such an assessment as was in fact necessary to satisfy the claims, but was a broad discretionary power to make an assessment for such sum as was necessary in their judgment to provide for such claims.
4. Receipt of an overdue assessment on condition that the member was then in good health did not waive a forfeiture caused by the delinquency, where the member was not in good health and there was a prompt offer to return the money upon discovery of the facts.
5. Under a policy providing for a reinstatement after forfeiture upon condition of the payment of all subsequent assessments, the making of a subsequent assessment does not operate as a waiver of the forfeiture.

6. The purchase by an attorney of the claim of his client, pending an action for its enforcement, with the intent to carry on the litigation at his own expense and for his own benefit, is champertous and void.
7. Champerty need not be pleaded or an issue formed in regard thereto in order that it may be established and a dismissal of the action obtained because thereof.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action to recover on an insurance certificate issued on the life of Louis Toepel in favor of his wife. The policy provided, among other things, that if any assessment made pursuant to the insurance contract should not be paid within the period stipulated the policy should be void. The constitution of the association authorized the executive committee to reinstate any delinquent member within one year after his delinquency occurred, for good cause shown and upon satisfactory evidence of good health and payment of subsequent dues and assessments. The insurance contract further provided that, "On the first week day of the months of February, April, June, August, October, and December of each year (or at such other dates as the board of directors may, from time to time, determine), an assessment shall be made upon the entire membership in force at the date of the last death of the audited death claims prior thereto, for such sums as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members according to the age of each member;" and that any member who should fail to pay any asssessment according to the terms of the policy should forfeit his membership and all the rights under his certificate.

On March 16, 1898, the board of directors and the executive committee of the association resolved as follows: "Inasmuch as on this 16th day of March, 1898, there is not a sufficient amount in the death fund to pay death claim No.

10,517, under policy No. 119,612, amount $2,000, issued to James L. Lang of Rouseville, Pa., and other claims (through deceased members) now standing approved by the executive committee, a mortuary call is hereby ordered to be made upon the entire membership subject by contract to assessment and in force upon the books of the association as its rules provide, on the 9th day of March, 1898, being the date of the death of said James L. Lang, whose proofs of death are approved and are now on file in this office, and the mortuary call shall be for one sixth of the maximum rates at the age of assessment, to apply to all policies upon the membership above named the executive committee may deem liable thereunder, and upon all other policies the amount or assessment shall be determined by the executive committee, and this shall be known as mortuary call No. 97." The amount of the assessment apportioned to the certificate in suit was $2.87. Under the terms of the insurance contract, the time limited for the assured to pay his assessment expired on the 1st day of May, 1898. He failed to pay the assessment within such period, whereby such certificate became forfeited, if the assessment was legally made, subject, however, to the right of the executive committee to reinstate the assured as a member of the association for good cause shown and on the further conditions above mentioned.

On May 13, 1898, and after Toepel, by reason of the facts stated, had ceased to be a member of the association, an assessment of $2.87 was made against him and notice thereof duly addressed to him.

On May 23, 1898, the assured, by a member of his family, applied to the association for reinstatement, sending with such application $2.87 and representing that the assured was in good health, had no idea of abandoning his insurance, and that the failure to pay the assessment within the time limited therefor occurred by reason of his being absent from his place of business and his agent in charge not understand-

ing the notice of such assessment. The next day after the money was sent to the association Toepel died, and on the next day it sent to his address a receipt for $2.87 and a notice of reinstatement of his membership on condition, among other things, that he was then, and had been for the previous twelve months, in good health, and that otherwise the retention of the money and the sending of the receipt should not waive the forfeiture of the certificate. Six days after the mailing of the receipt to the assured, the association received from the attorneys for Mrs. Toepel notice of the death of her husband, with a request for blanks to be used in making application for payment of the insurance. The association replied by sending such blanks, expressly reserving its right to insist upon a forfeiture of the policy, and offered to return the $2.87. Payment of the policy was refused because of the facts stated.

Mrs. Toepel commenced this action, *Mr. J. J. Miles* acting as her attorney. Thereafter *Miles* purchased the cause of action for a small amount of money, taking an assignment thereof and becoming, without objection, substituted as plaintiff in place of Mrs. Toepel.

The facts detailed were disclosed by the evidence, and at the close thereof defendant's counsel moved the court for the direction of a verdict, first, because the assignment of the policy to plaintiff was absolutely void, and second, because the evidence failed to establish a cause of action against defendant. The motion was denied and due exception taken to the ruling. A verdict was then, on motion, directed in plaintiff's favor, and a proper exception was taken thereto. Judgment was entered accordingly.

For the appellant there was a brief by *Tomkins & Merrill*, and oral argument by *Geo. F. Merrill.*

For the respondent there was a brief signed by *A. W. Sanborn*, of counsel, and oral argument by *J. J. Miles.*

The following opinion was filed November 16, 1900:

MARSHALL, J. The record does not disclose upon what ground the trial court decided that plaintiff was entitled to recover. Counsel for appellant have failed to be of any assistance in that regard, though they are here insisting that the judgment appealed from should be reversed on the merits. We find in counsel's brief, under the head of "Argument," about one half page of printed matter containing a mere statement that Toepel forfeited his membership by failing to pay call No. 97 for $2.87; that neither the receipt of the money on the false representation that Toepel was in good health, nor the making of the assessment subsequent to the forfeiture of the certificate, waived such forfeiture, with citations of a few authorities on each proposition.

It is not contended here, and we assume was not in the court below, but that Toepel in fact failed to pay call No. 97 within the time limited therefor by the insurance contract, or but that such failure was not waived by the mere giving of the conditional receipt for the money upon the representation made that Toepel was in good health. The insurance contract expressly provided that the membership created by it would terminate upon the failure of the assured to pay any assessment thereon, made according to its terms, within the time limited therefor by such contract. The evidence is undisputed that there was such a failure, assuming that call No. 97 was properly made, that the facts requisite by the terms of the contract to a reinstatement of the membership did not exist, that the money sent to pay the delinquent call was retained by the association on condition among others that the representations made to it as to Toepel's good health were true, that they were untrue, and that, upon the association being so informed, it promptly offered to return the money; leaving no room to claim that the forfeiture was waived from the mere fact of the giving of the conditional receipt. All of such propositions are so obviously correct that we must assume counsel have not

suggested in their brief the points which were in the judicial mind in the court below in directing a verdict for plaintiff, and have failed to meet such points in this court. Probably the circuit judge held that call No. 97 was not made as provided in the insurance contract. Counsel for respondent urges that point in support of the judgment, and it seems to be the only one the trial court could have deemed of sufficient importance to require much consideration.

It is well settled, as suggested by respondent's counsel, that when a forfeiture of an insurance policy is claimed as a justification for not paying it at maturity, the existence of the precise condition which by the terms of the contract worked its termination must be clearly shown. If such condition be failure to pay an assessment upon the membership, it must be made to appear that such assessment was made by the persons and under the conditions and for the amount provided in the contract, and that notice thereof was brought home to the assured according to its terms. Bacon, Ben. Soc. § 377; *Underwood v. Iowa Legion of Honor*, 66 Iowa, 134; *Bates v. Detroit M. B. Asso.* 51 Mich. 587; *Passenger Conductors' L. Ins. Co. v. Birnbaum*, 116 Pa. St. 565; *Covenant M. B. Asso. v. Spies*, 114 Ill. 463; *Baker v. Citizens' M. F. Ins. Co.* 51 Mich. 243. Hence the burden of proof in this case was upon appellant to show affirmatively, not only that the assured failed to pay an assessment imposed upon his membership, but that it was imposed strictly according to the terms of the insurance contract. It is claimed that appellant failed in that regard, and that the proper foundation was not laid for proving such facts because they were not pleaded in the answer as a defense. Proper exceptions were saved to the ruling of the court allowing appellant to introduce proof to establish such facts. It was stated in the answer that an assessment was duly made and notice thereof was duly given to the assured, and that he failed to pay, etc. It is contended that such allegations were mere conclusions

of law, not statements of facts. There is authority for that contention (*Am. M. A. Soc. v. Helburn*, 85 Ky. 1), but such a strict rule of pleading is not universal. It does not prevail in this state. Sec. 2668, Stats. 1898, provides that in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties. So it has been held that every reasonable intendment and presumption is to be made in favor of a pleading (*Morse v. Gilman*, 16 Wis. 504), and that if the essential facts can be gathered from the pleading, or may be reasonably inferred from the allegations, it is good, though such allegations be in form uncertain, incomplete, and defective. *Flanders v. McVickar*, 7 Wis. 372; *Merrill v. Merrill*, 53 Wis. 522. Criticisms of a pleading will not support a challenge for insufficiency to state a cause of action or defense, if sufficiency can be discovered reasonably by judicial construction of the language used and by reasonable inferences from general allegations. Such pleadings may be open to a challenge for uncertainty and indefiniteness, but not insufficiency. *Miller v. Bayer*, 94 Wis. 123; *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230; *Kliefoth v. N. W. I. Co.* 98 Wis. 495; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125.

Under the liberal rules stated, the existence of conditions precedent to liability is held to be pleaded from facts reasonably inferable from general allegations such as were used in this case, as, for instance, allegations that a note was duly presented for payment, and duly protested for nonpayment, and that notice thereof was duly given, have been held sufficient to show the existence of facts necessary to the liability of an indorser. *Cutler v. Ainsworth*, 21 Wis. 381; *Frankfort Bank v. Countryman*, 11 Wis. 398; *Gay v. Paine*, 5 How. Pr. 107; *Keteltas v. Myers*, 19 N. Y. 231. An allegation that all the conditions precedent to liability under a contract have been performed sufficiently pleads the exist-

ence of the facts constituting such performance. Sec. 2674, Stats. 1898; *Smith v. C. & N. W. R. Co.* 19 Wis. 326. True, the Code no more allows mere conclusions of law to be pleaded than the common law, but facts may be pleaded according to their legal effect when that does not lead to the statement of such mere conclusions. The allegation that an assessment was duly made, by reasonable inference, states that the conditions existed, and were properly so found, upon which the right to make the assessment depended, and that the assessment was made by proper authority within the meaning of the insurance contract.

It is further claimed by respondent's counsel that the evidence fails to show the assessment was properly made, because there was no proof that the executive committee determined upon any sum as necessary to satisfy existing approved death claims, and it appears that the directors delegated or attempted to delegate their power to make the assessment to the executive committee. That assumes that the insurance contract required the directors to make the assessment and the executive committee to fix upon the precise amount necessary to satisfy existing audited death claims.

We do not so understand the provisions of the constitution of the association. Section 5, as appears by the evidence, provides as follows: "On the first week day of the months of February, April, June, August, October, and December of each year (or at such other dates as the board of directors may, from time to time, determine) an assessment shall be made upon the entire membership in force at the date of the last death of the audited death claims prior thereto, for such sums as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members according to the age of each member." That seems plainly to leave the whole subject of making assessments to the executive committee, except in case of an assessment made at a time other than one specifically men-

tioned. In that event it is made the duty of the board of directors to determine upon the time for making the assessment. That is in harmony with what follows the above-quoted language, relating to the subject of forfeiture. We refer to the following: "A failure [by a member] to pay the assessment within thirty days from the first week day of February, April, June, August, October, and December (or within thirty days from the date of such periods as may be named by the directors) shall forfeit his membership in this association, with all rights thereunder, and the certificate shall be null and void." The requirement for action by the board of directors, it will be easily seen, is confined to fixing the time for making an assessment where it is made at a different time than one particularly pointed out by the constitution. Assessments made at such particular times, or to be paid within the period expressly provided for in the constitution, are left entirely to the executive committee.

The evidence shows that such committee and the board of directors, each acting in its own proper capacity, adopted a resolution March 16, 1898, reciting as facts that there was not sufficient money in the death fund to pay the last audited death claim and other death claims, all approved and payable, and ordering an assessment upon the entire membership of the association in force upon its books, subject by contract to assessment on the date of the death of a member mentioned in the resolutions, as to which it was said a death claim had been filed and approved, for one sixth of the maximum rates at the age for assessment, to apply to policies of all members deemed by the committee liable therefor, and that the amount of the assessment applicable to all other policies should be determined by the executive committee.

The action of the board of directors satisfied the condition requiring them to fix upon the date for making the assessment, since it was made on a day other than the "first

week day of February, April, June, August, October, or December;" and the action of the executive committee was, as indicated by the recitals in the resolution, based on a determination that the money in the death fund was insufficient to pay the outstanding audited death claims, and that the amount of the assessment made was necessary to provide for such deficiency. Whether the facts were correctly determined or not, in the absence of any proof of abuse of the discretionary power vested in the executive committee to determine the necessity for making the assessment and the amount of it, is not material. The power of the committee was not limited to that of making such an assessment as was in fact necessary to satisfy audited death claims, but it was a broad discretionary power to levy an assessment for such sum as was necessary in their judgment to provide for the audited death claims. The language of the resolution, that the assessment should apply to all members insured on the contract assessment plan, deemed by the executive committee liable to assessment, obviously referred to the constitutional provision to the effect that assessments shall go against all memberships in force. That imposed upon the assessment board the duty of determining what memberships were in force, or, in the words of the resolution, what memberships were liable to assessment. That part of the resolution to the effect that the assessment should extend to all policies not on the contract assessment plan, to such an amount as the executive committee should determine, had no reference to the class to which the Toepel membership belonged, therefore the validity of it is immaterial to this case.

It follows from what has been said that the evidence conclusively shows that call No. 97, whereby the sum of $2.87 was assessed upon the Toepel membership in the association, was made in all respects as provided in the insurance contract, that the assessment was not paid within the time limited there-

for, and that the membership was thereby forfeited. It needs no argument to demonstrate that payment of the assessment after the forfeiture, and acceptance of the payment upon the false representations made that the assured was in good health and a fit subject for reinstatement, when in fact he was at death's door from sickness,—the money being receipted for as a payment upon the certificate on condition of the representations as to the assured's health being true, and there being a prompt offer to return the money upon the association discovering the facts,—did not operate to waive the forfeiture. As before indicated we do not understand that the contrary is contended for. It has often been held that the receipt of an overdue assessment on condition that the member is in good health does not waive a forfeiture caused by the delinquency if the member is not in good health. *Rockwell v. Mut. L. Ins. Co.* 20 Wis. 335; *Lewis v. Phœnix M. L. Ins. Co.* 44 Conn. 72; *Crossman v. Mass. B. Asso.* 143 Mass. 435; *Unsell v. Hartford L. & A. Ins. Co.* 32 Fed. Rep. 443; *Ronald v. Mut. R. F. L. Asso.* 132 N. Y. 378.

It will be observed that the last case cited was against the same insurance association as this case. The facts were somewhat similar to those involved here. The assured was at the point of death when the assessment was paid. It was paid after the certificate was forfeited. The assured died the next day after such payment. The payment was accompanied by representations that the assured was in his usual health save a temporary trifling difficulty caused by his being intoxicated. The fact was he was dying with fatty degeneration of the heart. A receipt was given, substantially the same as in this case, and it was held that the forfeiture of membership in the association was not waived.

A claim is made that the forfeiture was waived because an assessment was made in May after such forfeiture. True, it is said in *Stylow v. Wis. O. F. M. L. Ins. Co.* 69 Wis. 224, that "every time the company makes an assessment against

the insured after he has failed to pay a previous assessment within the time prescribed by the rules, it waives the forfeiture of the policy for such failure to pay and admits him to be a member of the company notwithstanding such failure." That broad statement should be taken in connection with the facts of the case to which it was applied, and as qualified by *Toelle v. Central Verein G. U. G. G.* 97 Wis. 322, where it was held that under a policy which provides for a reinstatement after forfeiture if application be made therefor within a specified period after such event, upon condition, among other things, of the payment not only of a past but all subsequent assessments, the making of such subsequent assessments does not operate as a waiver of the forfeiture.

That covers this case on the point here discussed. It follows that, on the merits of this appeal, the judgment is wrong. The verdict should have been directed for defendant and a judgment have been rendered in its favor of no cause of action.

It is insisted by counsel for appellant that the trial court should have granted their motion for the direction of a verdict, if for no other reason, because the assignment of the alleged cause of action by Mrs. Toepel to her attorney, the respondent herein, pending the action to enforce it, was champertous and absolutely void. While the common-law doctrine as to champerty and maintenance is, in its main features, in force in this state (*Barker v. Barker*, 14 Wis. 131; *Martin v. Veeder*, 20 Wis. 466), it has not been applied heretofore, in any case in this court, to the purchase by an attorney of the claim of his client in a pending suit, to be enforced in such suit at the expense and for the benefit of such attorney. The cases that have been decided here, where champerty was involved, were of the kind more generally met with, and with which the courts are more familiar, i. e. those where an attorney prosecutes a suit under a con-

tract to pay the expenses of the litigation and to have an interest in the recovery. The real mischief which the law of champerty aims to prevent is that of encouraging litigation by persons who have no interest therein independent of that to be derived from carrying it on in whole or in part at their expense. That vice exists where an attorney purchases the claim of his client in suit with the intent to thereafter carry on the litigation at his own expense and for his own benefit, the same as where he agrees to carry on litigation at his own expense, in whole or in part, in the name of another. Such a transaction is, on common-law principles, held to fall under the condemnation of the law of champerty and to be absolutely void. *Arden v. Patterson*, 5 Johns. Ch. 44; *West v. Raymond*, 21 Ind. 305; *Greenman v. Cohee*, 61 Ind. 201; Greenhood, Public Policy, 437; *Simpson v. Lamb*, 40 Eng. L. & Eq. 59; *S. C.* 90 Eng. C. L. 84; Weeks, Attorneys at Law, 552. In *Simpson v. Lamb*, it was said, in effect, that independent of any statute an attorney is, by relation to his client, incapacitated from purchasing of him anything in litigation of which the attorney has the management. "Considering," said the court, "the relation in which the attorney and client stand to each other, it would seem to be against the policy of the law to permit such a dealing by an attorney with the subject of a suit of which he has the conduct as the attorney, while the case is still undetermined by judgment, as that which is now in question before us."

Thus stands the common-law rule as recognized by the courts of England and the courts of this country as well, where the common-law doctrine of champerty has been in the main adopted. Attorneys are officers of the court and charged as such with duties in the administration of justice entirely inconsistent with liberty to traffic in the subjects of the litigation of which they have the management. The law which condemns such transactions necessarily renders

them absolutely void, and when a court is requested to refuse to aid in carrying out such a transaction, by a motion to dismiss the action in which the champertous agreement is involved, the motion should be granted. Moreover, the court may properly act on its own motion in dismissing the action, upon the illegal character of the transaction involved becoming apparent. When a trial court is made fully acquainted with the fact that a suit on trial before it is tainted with champerty, a failure to refuse to proceed therein in effect makes such court a party to the illegal transaction. It has been said that, 'when it appears satisfactorily to the court in proof that the suit is affected by champerty, it is its duty not to permit itself to become the organ or instrument of carrying out the champertous agreement, but it should repel the plaintiff and his suit.' *Webb v. Armstrong*, 5 Humph. 379.

Champerty need not be pleaded and an issue need not be formed in regard thereto in order that it may be established and taken advantage of in the suit. It cannot be waived by any party to the litigation, nor stipulated out of the case. The taint of champerty does not affect the merits of a case at all, but affects the right of the champertor to use the court, regardless of the mere merits of his claim. *Barker v. Barker*, 14 Wis. 131.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the action with costs.

The respondent moved for a rehearing.

For the appellant there was a brief by *Tomkins & Merrill*, and for the respondent a brief by *J. J. Miles*, in person.

The motion was denied January 8, 1901.

THE STATE EX REL. O'DONNELL, Appellant, vs. BENZENBERG and others, Commissioners, etc., Respondents.

November 19, 1900—January 8, 1901.

Municipal corporations: Public works: Contracts: Failure to file plans before advertising: Rights of accepted bidder: **Mandamus.**

Where no "plan or profile of the work to be done" had been placed on file, as required by the city charter of Milwaukee (sec. 9, subch. V, ch. 184, Laws of 1874), at the time of advertising for proposals for a public work or improvement, the board of public works will not be compelled by *mandamus* to enter into a contract for the work, even though the council has accepted a proposal therefor and directed the board to make the contract.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *O'Connor, Hammel & Schmitz.* They contended, *inter alia,* that the proposal made by Crilley and *O'Donnell,* and the acceptance thereof by the common council, constituted a contract. *Adams v. U. S.* 1 Ct. Cl. 192; *Wiles v. Hoss,* 114 Ind. 371; *Matter of Protestant Episcopal School,* 58 Barb. 161; *People ex rel. C. P. R. Co. v. Sup'rs of San Francisco,* 27 Cal. 655; *People ex rel. Taylor v. Brennan,* 39 Barb. 522; *Smalley v. Yates,* 36 Kan. 519. This proceeding is simply to compel the board to execute and deliver to the party entitled thereto the written evidence of the contract entered into when the common council accepted the proposal, as aforesaid. The relator is not seeking to enforce any duty on the part of the board involving their discretion, or seeking to control their discretion.

For the respondents there was a brief by *Carl Runge,* city attorney, and *C. H. Hamilton,* of counsel, and oral argument by *Mr. Hamilton.* They argued, among other things, that the proposals provide not only for the collection of the gar-

bage, but its disposal within the city limits by the Holthaus process, which involves the construction of a large building and crematory, which the contractor was willing to dispose of to the city after five years' usage for $165,000. Certainly plans as well as specifications are necessary. *Houghton v. Burnham*, 22 Wis. 301; *Ricketson v. Milwaukee*, 105 Wis. 591. All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make the contract, and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. *Marsh v. Fulton Co.* 10 Wall. 676; *Leavenworth v. Rankin*, 2 Kan. 357; *Horn v. Baltimore*, 30 Md. 218; *Bridgeport v. Housatonuc R. Co.* 15 Conn. 475, 493; *Haynes v. Covington*, 13 Smedes & M. 408; *Laft v. Pittsford*, 28 Vt. 286; *Dill v. Wareham*, 7 Met. 438; *Branham v. San Jose*, 24 Cal. 585, 602. Persons will not be protected on contracts with a public corporation which are not made according to law. *Mackey v. Columbus*, 71 Mich. 227.

CASSODAY, C. J. This is a proceeding for *mandamus* to compel the board of public works of the city of Milwaukee forthwith to fix a time and place when and where they will meet and receive from the relator a good and sufficient bond, as provided by the charter, after having first given to the relator six days' notice of the time and place of such meeting, and that upon the reception and approval of such bond in the sum of $54,000 the board of public works sign the contract theretofore agreed upon by and between the relator and the board of public works, and permit the relator to proceed forthwith with the execution of the contract.

It appears from the record that May 24, 1897, the relator and one John J. Crilley proposed to the board of public works to furnish all the material and do all the work according to the plans and specifications on file with the board for the collection, transportation, and complete and sanitary disposal of

all the garbage and dead animals collected within the city limits for the period of five years at the prices annually therein named; that the manner or method so proposed to be used was therein stated to be known as the "Holthaus System;" that July 7, 1897, the common council adopted a resolution accepting such proposal, and directed the board of public works to enter into a contract in accordance with the provisions of the notice to bidders and specifications on file in their office with the relator and Crilley for such collection, transportation, and disposal within the city limits by the Holthaus system or process for a period of five years from and after ninety days after the date of the execution of the contract; that July 7, 1897, the amount of the bond was fixed by the board, and thereupon the board, city attorney, and the relator and Crilley agreed upon the terms of a blank agreement of the tenor and effect indicated, to be executed by the relator and Crilley as parties of the first part, and by the commissioners of the board of public works, in behalf of the city, as parties of the second part, and to be countersigned by the comptroller; that March 8, 1898, Crilley, in consideration of $1 and other good and valuable considerations, assigned unto the relator, *O'Donnell*, all and singular his claim, right, title, and interest in and to and by virtue of such proposal to and acceptance by the common council, with full power to enter into any contract with the city or board of public works in his own name, with the same effect, so far as Crilley was concerned, as if they had jointly entered into the contract in pursuance of such proposal; that about the same time the relator notified the board of public works of such assignment to him by Crilley; that on or about April 9, 1898, the relator notified the common council that — he and Crilley being the lowest bidders for the performance of the job by the "Holthaus system or process," which had previously been adopted by the common council — Crilley had, without his knowledge or author-

ity, submitted to the common council a proposition requesting them to release and relieve Crilley and the relator and their bondsmen from all obligations on their bond accompanying their bid; that the common council neglected and refused to take action thereon.

June 8, 1898, an alternative writ of *mandamus* was issued for the purpose indicated. Thereupon the several defendants moved the court to quash the writ for the reason that such petition failed to show facts entitling the relator to such writ. After the hearing of such motion, the trial court, on June 27, 1898, granted the same, and quashed the alternative writ, and dismissed the petition therefor. From that order the relator brings this appeal.

It was held by this court at an early day, and has since been repeatedly sanctioned, in effect, that a peremptory writ of *mandamus* will only issue where there is a specific legal right to be enforced, or a positive duty to be performed, and there is no other adequate legal remedy. *State ex rel. Pfister v. Mayor of Manitowoc*, 52 Wis. 427, and cases there cited. In the case at bar counsel for the defendants contend that the petition for the writ fails to state that the city comptroller countersigned the resolution accepting the proposal of the relator and Crilley; that it also fails to state that the mayor approved the resolution of the common council accepting such proposal; that it also fails to state that the city attorney approved the bond accompanying such proposal as to form and execution; that it also fails to state that there were funds in the city treasury available for the purpose of carrying out such contract; that it also fails to state that the relator and Crilley procured and tendered the bond required by the board of public works; and that it also fails to state that the board of public works had provided any general plans for the information of bidders. In support of the contention that such failures bar the relator's right to a *mandamus* counsel cite the following sections and subchap-

ters of the charter: Sec. 13, ch. III; secs. 5, 7, ch. IV; secs. 2, 9, 10, 13, 17, 20, 23, 24, ch. V.

We do not deem it necessary to consider all the questions thus presented. One of these sections provides that: "Whenever any public work or improvement shall be ordered by the common council, the said board shall advertise for proposals for doing the same — a plan or profile of the work to be done, accompanied with *specifications* for doing the same, or other appropriate and sufficient description of the work required to be done, and of the kinds and quality of material to be furnished, *being first placed on file* in the office of said board for the information of bidders and others. . . . All proposals shall be sealed and directed to said board, and shall be accompanied with a bond to the city; . . . such bond and sureties to be approved by the board *previous* to the opening of the accompanying bids or proposals, and shall be conditioned that such bidder will execute and perform the work for the price mentioned in his proposals and according to the *plans and specifications on file* in case the contract shall be awarded to him." Sec. 9, ch. V. The manifest purpose of these provisions was to require such "plan or profile" with such "specifications" to be so filed for the information of bidders prior to advertising for such proposals. The petition in the case at bar recites, in substance, such statutory requirements, but fails to allege that any such "plan or profile" was ever filed. As stated by my brother BARDEEN in a recent case, the common council "alone had authority to take the initial step. It was its duty to procure the proper plans and specifications for any work proposed." *Ricketson v. Milwaukee*, 105 Wis. 598. The petition refers to the proposal of the relator and Crilley "in accordance with the specifications therefor on file." This proposal is dated several days after the advertisement, and speaks of "plans and specifications on file," but further states that, "The manner or method proposed to be used is known as

the 'Holthaus System.' Plans and specifications *are herewith* attached." The proposed blank contract repeatedly speaks of "specifications on file," but makes no mention nor reference to any "plan or profile" on file or otherwise. According to the petition, the resolution of the common council adopted July 7, 1897, accepting such proposal of the relator and Crilley, directed the "board of public works to enter into a contract, in accordance with the provisions of the notice to bidders and the specifications on file in their office, with" the relator and Crilley, to dispose of such garbage "by the Holthaus system or process," but is silent as to plans or profile. The case comes squarely within the condemnation of this court in the case last cited. The opinion of Mr. Justice BARDEEN in that case completely covers this branch of this case. Pages 597–603. So, in this case as in that: "If it be admitted that the projected scheme contemplated the use of a patented process, the council had the undoubted right to authorize the board to secure the privilege of using it without resort to an advertisement for bids. Such, however, was not their procedure. . . . The indefinite character of the specifications and the absence of plans had the effect of stifling all competition. Each bidder was called upon to make a proposal, resting largely upon his own judgment, with absolutely no guide as to details. No one could tell which was the lowest bid, because no two bids would be on the same basis. That fact alone condemns the action taken. Of course, the court must take into consideration what was sought to be accomplished. At the same time it must consider that it can only be accomplished in the way pointed out by the charter."

We must hold that the alternative writ of *mandamus* was properly quashed.

By the Court.—The order of the superior court of Milwaukee county is affirmed.

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FLANDERS and others, Respondents, vs. KEEFE, Appellant.

November 20, 1900 — January 8, 1901.

Attorneys at law: Professional misconduct: Disbarment.

1. In proceedings to disbar an attorney at law, there is *held* to have been a clear preponderance of satisfactory evidence in support of findings of the trial court, to the effect that the defendant attempted to deceive the court in which a judgment had been rendered against him by making and presenting, upon a motion to set aside an execution issued on such judgment, affidavits known by him to be false, stating that he had, at a certain date prior to the issuance of such execution, served a notice of appeal from such judgment upon the attorney of the opposite party and upon the clerk of the court, and by falsely pretending and claiming that a certain paper, found some months later in the clerk's office among the papers in the case, was the notice he had served on the clerk, when in fact such paper had been secretly placed among the files by defendant himself at some time after the issuance of the execution.
2. For such misconduct the defendant was properly disbarred.

APPEAL from an order and judgment of the circuit court for Milwaukee county: JAMES O'NEILL, Judge. *Affirmed.*

For the appellant there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *W. H. Timlin.*

For the respondents there was a brief by *Stark & Hansen*, and oral argument by *Joshua Stark.*

CASSODAY, C. J. Upon the verified petition of *James G. Flanders* and four other lawyers of Milwaukee, made November 25, 1898, the defendant, *John C. Keefe*, was, on December 9, 1898, ordered by the circuit court for Milwaukee county to show cause before that court on a day named why his license to practice as an attorney in the courts of this state should not be revoked and he be disbarred. Such petition charged, in effect, that in 1897 the defendant, *John C. Keefe*, was indicted by the grand jury and tried in the

United States district court for the Eastern district of Wisconsin for unlawfully retaining a certificate of pension after due demand therefor by the pensioner to whom it was issued by the United States, and refusing to surrender such certificate to the pensioner on his demand until he should be paid an alleged debt against the pensioner; that upon the trial he was convicted of such offense by a verdict of the jury, and was thereupon sentenced to pay a fine and the costs of prosecution, amounting to $177.39, which was paid by him, and that such conviction remains in full force; that in August, 1896, the defendant, *Keefe*, made false statements in his several affidavits in respect to the service of notice of appeal in his action against Edward J. Furlong, which had previously been determined against him in the superior court of Milwaukee county, knowing the same to be false, with the intent to deceive the court in respect thereto; that he placed, or caused and procured to be placed, among the files in his action against Furlong in the office of the clerk of the court, a paper (known as Exhibit E) purporting to be a notice of appeal to this court from the judgment in that action, and claimed and insisted before that court upon the hearing of a motion made by him in that action that such paper (Exhibit E) was in fact filed with the clerk in that action April 25, 1896, when in fact, as he, the defendant, well knew, Exhibit E had not been filed with the clerk, but had been secretly placed among the files in that action long after August 15, 1896,—such claim being intended to deceive that court in respect to the matter upon which such motion was based.

The defendant answered such petition by way of admissions, denials, and counter allegations, and, among other things, admitted that he had been convicted in the United States district court of having retained a certificate of pension, but claimed that it was not criminal, and at most was *malum prohibitum;* and further alleged that his several affi-

davits in the Furlong case were each and all strictly true, and that the notice of appeal was served on Furlong's attorney April 25, 1896, and filed with the clerk of the superior court on the same day.

The issues thus formed having been tried in the circuit court January 31, 1899, that court made its findings of fact and conclusions of law therein July 11, 1899, to the effect that the conviction and sentence in the United States court was for a statutory misdemeanor only, was committed by the defendant when he was not aware of the statute creating the offense and hence was not guilty of any conscious or intentional violation of such statute, and therefore was not sufficient ground to revoke his license to practice as an attorney in the courts of this state. The court further found that the action commenced by the defendant against Furlong in August, 1895, was tried in the superior court of Milwaukee county, and as a result of such trial a judgment was entered therein February 25, 1896, dismissing the action, with $239.59 costs; that, a bill of exceptions having been settled and signed therein, the same was filed with the clerk of the court therein April 25, 1896; that May 1, 1896, the defendant herein filed with such clerk an undertaking in the form required to stay proceedings in case of an appeal to this court; that on or about July 29, 1896, Furlong's attorney issued an execution on such judgment against this defendant for the collection of such costs; that August 1, 1896, this defendant procured from the judge of that court an order to show cause why such execution should not be revoked and set aside, returnable September 12, 1896; that such order to show cause was heard by the superior court September 19, 1896, at which time the defendant herein submitted to that court in support of such motion the three several affidavits made by himself, one of which was sworn to by him August 1, 1896, and the other two August 29, 1896, in each of which he stated on oath, in substance, that pro-

ceedings were had in the Furlong case April 25, 1896, whereby that case was appealed to this court; that in one of such affidavits so made August 29, 1896, he stated under oath that he served on F. C. Eschweiler, attorney for Furlong in that action, a notice of appeal to this court in that action, under sec. 3049, R. S., dated April 25, 1896, that a similar notice of appeal therein was served on A. W. Hill, the clerk of that court, and that such notice of appeal and a copy of such undertaking were duly served on such attorney for Furlong by leaving a copy of the same at his office in the city of Milwaukee, April 25, 1896, by the defendant herein personally; that in the other affidavit so made by the defendant herein August 29, 1896, and which was attached to a notice of appeal in that action, the defendant herein stated under oath that he personally served such notice of appeal to this court in that action April 25, 1896, on Furlong's attorney, Eschweiler, by then and there delivering to him and leaving with him at his said office, April 25, 1896, a copy of such notice of appeal, and a copy of the undertaking given thereon, and that copies of the same were also duly served on said Hill, clerk of that court, and deposited in the office of that clerk; that said several affidavits of the defendant herein were so made and used by him upon the hearing of that motion in that court for the purpose of showing and inducing the judge of that court to believe that an appeal from the Furlong judgment for costs had been in fact perfected April 25, 1896, by due service of a notice of appeal on that day, and hence that the issue of an execution on that judgment by Furlong's attorney, July 29, 1896, was irregular.

The court further found that such statements of the defendant herein in such affidavits were false, and were known by him to be false at the time they were so made; that it was not true that notice of appeal from the Furlong judgment was served, either on Furlong's attorney, Eschweiler,

or upon the clerk of the superior court, or were filed or deposited in the office of that clerk April 25, 1896, or at any time prior to July 29, 1896, when such execution was so issued; that the defendant herein made such false statements in such affidavits wilfully and corruptly, knowing when he so made them that the statements therein respecting the service of notice of appeal were false, and intended thereby to deceive and mislead the court; that at the hearing of such motion, September 19, 1896, the defendant herein also claimed and maintained before that court that a certain paper (Exhibit E) purporting to be a notice of appeal, and then found among the files in that action in the office of the clerk of that court, had been in fact filed therein April 25, 1896, when in fact such pretended notice of appeal so found among the files in that action September 19, 1896, was not in fact filed, and never had been filed, with the clerk of that court, and was not among the files in that action before July 29, 1896, but was secretly placed among such files by the defendant herein at some time after the issue of such execution, and without the knowledge of the clerk of that court, or of his deputies or clerks, or either of them, for the evident purpose of enabling the defendant herein to urge the presence of such pretended notice so among such files upon the attention of that court as evidence in support of his claim and assertion so made in his said affidavits to the effect that he had in fact perfected an appeal to this court April 25, 1896; and that all the allegations in the petition in respect to the acts of the defendant herein in the proceedings in the Furlong action were true.

And as conclusion of law the court found, in effect, that by reason of such false statements in his said several affidavits, knowing the same to be false, with the intent and for the purpose of deceiving the court in respect thereto, and having falsely claimed and insisted before the superior court upon the hearing of such motion, as stated, that the

paper (Exhibit E) found among the files in that action at the date of such hearing, purporting to be a notice of appeal to this court from the judgment in the Furlong case, was in fact filed with the clerk in that action May 25, 1896, when in fact, as he then well knew, Exhibit E had not been filed with the clerk of that court, but had been secretly placed among the files in that action after July 29, 1896, by him, intending thereby to deceive and mislead that court in respect to the matter upon which such motion was based,—the defendant herein was therein and thereby guilty of gross improprieties and misconduct as a lawyer in the practice of his profession, as charged in the petition in this matter, and was and is not a fit and proper person to practice law as an officer of the court, or to be a member of the legal profession.

Upon such findings it was thereupon ordered and adjudged by the circuit court that the defendant herein, *John C. Keefe*, be, and he was thereby, forever disbarred from practice as an attorney at law in this state, and that his name be stricken from the roll of attorneys of the circuit court, and that his license to practice law as a member of the bar of this state be revoked and annulled. From that order and judgment, and the whole thereof, the defendant brings this appeal.

This court held several years ago, in effect, that, in order to disbar an attorney, the charges of professional misconduct must be established by a clear preponderance of satisfactory evidence. *In re O——*, 73 Wis. 617, and cases there cited. That case has been cited approvingly in other jurisdictions. *Boston Bar Asso. v. Greenhood*, 168 Mass. 183; *In re O'Connell*, 174 Mass. 253, 262. As stated by that court and standard text writers the "primary purpose" of such a proceeding "is not punishment, but the preservation of the purity of the courts, and the protection of the public from attorneys who disregard their oath of office." *Id.*, citing numerous

adjudications in support of the proposition. *In re Ó——*, 73 Wis. 621; Weeks, Attorneys at Law, § 80. In the language of Lord ESHER, M. R., speaking for the court, in a recent case: "In order to support such a motion as the present, it must be shown that he [the attorney] had done something dishonorable to him as a man and dishonorable in his profession. . . . It was a breach of duty wilfully to mislead the court by keeping back information which he knew the court ought to have, or by stating facts which he knew to be untrue." *Re Cooke*, 33 Sol. J. & Rep. 397. There are numerous cases in each of which an attorney has been disbarred for knowingly deceiving or attempting to deceive the court as to matters pending before it; also for changing its records. A few only are here cited. *Matter of Gale*, 75 N. Y. 526; *Matter of Ryan*, 143 N. Y. 528, 530, 531; *Serfass's Case*, 116 Pa. St. 455; *People ex rel. Moses v. Goodrich*, 79 Ill. 148; *People ex rel. Witherow v. Leary*, 84 Ill. 190; *People ex rel. Att'y Gen. v. Beattie*, 137 Ill. 553; *People ex rel. Att'y Gen. v. Hill*, 182 Ill. 425; *People ex rel. Deneen v. Pickler*, 186 Ill. 64; *State ex rel. Walker v. Harber*, 129 Mo. 271.

According to the findings of the trial court in the case at bar the attempt to deceive the court consisted in making and presenting to the court false affidavits as to the pretended service upon Furlong's attorney, Eschweiler, and the clerk of the court, A. W. Hill, of a notice of appeal to this court, April 25, 1896, from the Furlong judgment, on a motion to set aside the execution issued thereon July 29, 1896; and also falsely pretending that Exhibit E, found in the clerk's office among the papers in that case after the day and year last named, was the notice of appeal he served on A. W. Hill April 25, 1896. The important question is whether such findings of the trial court are sustained by a clear preponderance of satisfactory evidence.

Eschweiler, as a witness, flatly denies that any notice of appeal, or copy thereof, from the Furlong judgment, was

ever served upon him personally April 25, 1896, or at any time prior to the issue of such execution; and that no notice of appeal from that judgment, during that time, ever came to his observation in his office or elsewhere. The clerk of the court, A. W. Hill, as a witness, denies that any notice of appeal from that judgment was ever served upon him April 25, 1896, or at any time prior to September 18, 1896; but states that Exhibit E was found among the papers in his office some time prior to September 18, 1896. Six deputy clerks were sworn as witnesses in this case, and stated the customary manner of receiving and filing papers in the clerk's office, and the entries of such filings in a book kept for that purpose, and that no such entry was made as to Exhibit E; and none of them had any recollection of that paper having been brought to the clerk's office, and none of them had any recollection of ever having seen that paper until their attention was called to it by Eschweiler some time after July, 1896. But it is claimed that it does not conclusively appear that a copy of the notice of appeal was not served on Eschweiler by the defendant herein, April 25, 1896, especially by leaving such copy in his office during his absence, in the manner prescribed by statute. Sec. 2820, Stats. 1898. So it is claimed that it does not appear conclusively that Exhibit E was not delivered by the defendant herein to some one of the deputy clerks present in the clerk's office April 25, 1896, and that, if he did, the service on the clerk was sufficient under the ruling of this court. *In re Will of Madden*, 104 Wis. 61, 63. It is claimed that such testimony of the clerk and his deputies is negative in its character. But the defendant's testimony in that regard is also negative to the extent of saying that he does not know to which of the clerks he delivered such notice, Exhibit E; that he could not say that the person to whom he delivered it was one of the deputies, nor who it was. It stands admitted that *Keefe* was, prior to September 19, 1896, quite often in the clerk's

office, and usually called for and examined the papers in the Furlong case. Exhibit E is in the record before us, and the written portion is conceded to be in the handwriting of the defendant, and it certainly has a suspicious appearance. It bears upon its face evidence that it had been stamped, but, as stated by one of the deputy clerks, such stamped file mark had been rubbed and blurred, so that the month was entirely obliterated. Its worn and soiled condition is such as to readily attract attention, and to justify the respective clerks in testifying that such stamped file mark had not been put there by them, and that they had never seen the paper until after July, 1896, as stated.

The most serious difficulty with the contention on the part of this defendant is the inconsistent and contradictory statements of the defendant under oath. In his affidavit of August 1, 1896, he stated, in effect, that on or about April 25, 1896, proceedings were had whereby the action was appealed to this court; that notice was given to Eschweiler that the action *would be appealed;* and that the appeal was duly perfected, and all necessary steps taken. The order to show cause was based upon that affidavit, and yet it is manifest that it failed to state the facts requisite for the taking of the appeal. The substance of his two affidavits of August 29, 1896, is given in the statement of facts. In one of them he states that he personally served the notice of appeal on Eschweiler by leaving a copy of the same in his office April 25, 1896; and in the other he states that he personally served the same on Eschweiler in his office April 25, 1896, by then and there delivering to him and leaving with him a copy of the notice of appeal and a copy of the undertaking. As a witness in his own behalf, the defendant testified in this action to the effect that April 25, 1896, he served a copy of the notice of appeal and two bonds on Eschweiler in the office of the clerk of the court by laying them on the desk and saying, "Here is the notice and bonds; accept them;" that

Eschweiler's back was towards him at the time, and that he left the office with the papers remaining there on the desk; that the defendant then picked up the papers, and subsequently went to Eschweiler's office, which he found with the door open, and no one in; that he placed the notice on Eschweiler's desk, which was closed; that he did not remember what kind of a desk it was. In one of his affidavits of August 29, 1896, he swore, as indicated in the statement of facts, that April 25, 1896, he served the notice of appeal upon the clerk of the court, A. W. Hill, whereas in his testimony in this case he does not pretend to know to whom he delivered such notice, or even that the person to whom he delivered it was a clerk or a deputy clerk. The defendant was admitted to the bar in 1894, and was fifty-two years of age at the time of the trial. He states that such appeal was the first he ever undertook to take. It is apparent that when he made the affidavits of August 1, 1896, he did not know what was essential to the taking of an appeal. On this trial he testified to the effect that the disagreement between himself and Eschweiler was so intense that he employed Estabrook to make the bill of exceptions and to attend to the whole matter and perfect the appeal; that Estabrook had a motion in court, and had to go away, and so finally said to him: "Everything is all done that is needed to be done. All you have to do is to file your notice of appeal and bond; that is all;" and that everything else was done; that from such statement he got the notion that everything was all right, and so forgot to make the affidavit of service; that he got such impression April 25, 1896. It is evident that the defendant herein relied more upon what Estabrook thus told him to do in order to perfect the appeal than he did upon any knowledge he then possessed as to the statutory requirements essential to perfect an appeal. Such want of knowledge so continued until after the issuing of the execution and down to within a few days of the hearing

of the motion, and the numerous inconsistent and contradictory statements under oath in respect to the pretended service of the notice of appeal, and the suspicious and mutilated condition of the notice of appeal, Exhibit E, filled out in the handwriting of the defendant, and not found among the papers in the case in the clerk's office until more than three months after it is claimed it was served, leads to the conclusion that no substantial reliance can be placed upon the defendant's evidence.

Without going further into details, we must hold that the findings of the trial court are sustained by the clear preponderance of satisfactory evidence.

By the Court.—The order and judgment of the circuit court are affirmed.

BAUMANN, Executor, and others, Respondents, vs. LUPINSKI and husband, Appellants.

December 7, 1900—January 8, 1901.

Deeds: Reformation: Fraud: Omission of reservations: Evidence.

1. Solemnly executed instruments are not to be set aside or reformed except upon evidence sufficient to establish mistake or fraud so clearly as to leave no substantial doubt.
2. A finding of the trial court that an absolute conveyance of land by a person since deceased to one of her daughters was obtained by fraud of the grantee, and that it should be reformed so as to impose upon it a reservation of the payment of certain sums to other daughters, is *held* to be unsupported by the evidence (stated in the opinion), which fully establishes the intentional execution of the deed without reservation or condition.
3. Declarations consistent with a mere promise on the part of the grantee that certain sums shall be paid are of themselves, alone, insufficient to establish that a reservation or condition was intended to be incorporated in a deed.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Plaintiffs, being executor and three daughters of Johanna Hoyer, brought this action to set aside, for fraud, a deed of February 3, 1896, from her to defendant *Emilie Lupinski* (another daughter) of the house and lot constituting the homestead of Mrs. Hoyer. The court found that *Emilie Lupinski*, enjoying the confidence of her mother, sent for a notary, and, without the knowledge of her mother, caused a deed to be drawn by him and executed by said Johanna Hoyer, absolutely deeding the property to her (said *Emilie*), without putting into the deed certain reservations as to payments to the other daughters; that the omission of such reservations was by intentional fraud perpetrated by said defendant *Emilie* upon her mother, who had no knowledge of the omission. Accordingly judgment was entered reforming said deed so as to impose upon the conveyance a reservation of the payment of certain sums. From that judgment defendants appeal.

For the appellants there was a brief by *Fiebing & Killilea*, and oral argument by *O. J. Fiebing*.

M. N. Lando, for the respondents.

Dodge, J. It appeared by uncontradicted testimony or without dispute that Johanna Hoyer, having five daughters (four by her first marriage, and defendant *Emilie Lupinski* by a second), in 1893 made a will whereby she gave to the three plaintiffs certain sums of money, which, together with advances, made up the sum of $2,000 to each of them, and that she had previously advanced to the fourth daughter of the first marriage $2,000. By the same will she gave all her property, real and personal, except life insurance, to her daughter *Emilie*, charged with the payment of these sums to her half-sisters, which aggregated $2,000, viz.: $1,000 to *Mrs. Gallun*, $900 to *Mrs. Puls*, $100 to *Mrs. Baumann*. In the latter part of January, 1896, the plaintiff *Louis Baumann*, husband of Mrs. Hoyer's daughter *Emma Baumann*,

suggested to *Emilie* that a deed of the real estate be made to her, in order to avoid the necessity of probating the will, and later learned from *Mrs. Lupinski* that she had talked the subject over with her mother, who assented to the idea. They two went to find Mr. Bodenstab, a notary, to give instructions for drawing the deed, but did not find him. Later, either that day or soon afterwards, *Mrs. Lupinski* sent a messenger for him, and he came to the house of Mrs. Hoyer, where *Mrs. Lupinski* lived, in the evening of February 3d, and there drew the deed in question, and took the acknowledgment of it. The expressed consideration was love and affection and one dollar. He received all his instructions with reference thereto from Mrs. Hoyer. She asked whether such a deed would hold good, and he expressed his opinion in the affirmative. He asked her whether there were any conditions or anything of that kind to be made,— whether anything was to be paid to anybody else on account of the deed,—and she told him no; that she desired *Emilie* to become the owner of the entire property, so that nobody else could make any claim against her; and that nothing was to be paid by her (*Emilie*), by reason of that deed, to anybody,—nothing to be paid by her to the other children. Thereupon the deed was delivered to *Emilie* in his presence. Mrs. Hoyer further declared that *Emilie* had taken care of her thus far, and would take care of here thereafter, and she gave her the deed now. *Mrs. Lupinski* gave no instructions as to the drawing of the deed, and had no talk with the notary before his conversation with the old lady. The witness to the deed, a lodger in the house, who was called in for the purpose, did not arrive until after the deed was drawn and ready for execution. He testified that Mrs. Hoyer said she was satisfied now that no one else had any hold of her property, and that now there would be no trouble about it; that she sold it to *Mrs. Lupinski.* Nothing was said in his presence further than that she sold it to her,

and that none of her sisters would get any hold of her property, and that there would be no trouble now about it.

Emilie Lupinski, on examination under sec. 4096, S: & B. Ann. Stats., put in evidence by the plaintiffs, testified that her mother told her when she made the deed that she wanted her (*Emilie*) to have the deed for this property, and said, "I will sell the property to you, so that you will not have trouble with your brothers and sisters after a while." "She said it ought to be mine, because I always did my duty to her. I knew about the payments of certain sums to my sisters, but when my mother deeded the property to me she said I would not have to pay them any money, because they were not entitled to any."

On February 6th the deed was recorded, and the fact of its record came to the notice of some or all of the plaintiffs, though whether they learned its contents immediately is not clear. At the time of the deed Mrs. Hoyer was seventy-eight years of age, but concededly fully competent to understand and manage her own affairs. *Mrs. Lupinski* and her husband had made a home for her mother in the latter's homestead for many years, caring for her in illness, etc. There was no evidence as to what other estate Mrs. Hoyer had, except that defendant *Max Lupinski* owed her $3,000 for money previously loaned to him.

Opposed to the facts thus established without dispute was the testimony of the plaintiff *Louis Baumann* that, when he spoke to *Mrs. Lupinski* about the advisability of making a deed in lieu of the will, his understanding was that it ought to include the clause requiring the giving of the money to the sisters as in the will. As to whether he actually spoke of this his testimony is somewhat indefinite. When asked what directions were to be given to the notary by him and *Mrs. Lupinski*, he testifies: "I wanted to make a deed with a clause put in that *Mrs. Lupinski* had to pay to her sisters *Louisa Gallun* $1,000, and $900 to *Mrs. Puls*,

and $100 to *Mrs. Baumann.* I gave her that advice." He was informed by *Mrs. Lupinski* a few weeks after the deed was made that no such reservation was contained in it, because her mother did not think it was necessary. It is, however, nowhere testified that any conversation was had with the grantor, Mrs. Hoyer, on the subject of the deed or any intended reservation therein. *Mrs. Baumann* testifies that a few days before her mother's death her mother told her that "everything was in shape, and *Emilie* knows everything about it, and she would pay us." *Mrs. Gallun* also testified: "Since that deed was made I often had conversations with my sister, always in mother's house and in her presence, after the deed was made. When I came there *Mrs. Lupinski* said, 'You know I have to pay all the money I owe you.' And mother said the same. She said we need not be afraid we would not get the money; she would pay it." "We did not quarrel about the deed, because mother said she had the deed and she would pay us." "She always promised to pay us, and always said she would pay us. We were satisfied as things were, because we did not know any other way. We thought we would get the money." There was other testimony tending to the effect that *Mrs. Lupinski* advised against troubling the mother in her last days, saying she would pay whatever she owed.

In the light of this evidence, we are constrained to the conclusion that the finding of the trial court is wholly unsupported by any evidence or legitimate inference from the evidence. The intentional execution of the deed, absolute in form, is fully established by the evidence of disinterested witnesses, of whose credibility no doubt is suggested by anything in the record. But were this otherwise, and the deed unsupported by such express evidence, according to the rule of many authorities it could not be reformed upon the evidence offered by plaintiffs, which contains not even an intimation from the lips of Mrs. Hoyer that she did not

intend to execute the deed in the form in which it appears. Solemnly executed instruments are not to be set aside or reformed except upon evidence sufficient to establish mistake or fraud so clearly as to leave no substantial doubt. *Kercheval v. Doty*, 31 Wis. 476; *Fillingham v. Nichols*, *ante*, p. 49, and cases cited. The utmost effect of any of the testimony is that *Mr. Baumann* suggested to *Mrs. Lupinski* a deed containing these reservations, and that *Mrs. Lupinski* had received this deed with some understanding or agreement on her part to pay the various sums to her sisters, aggregating $2,000,—an understanding that may, perhaps, be easily enforceable against her; for there is no showing that Mrs. Hoyer did not leave, besides this homestead, abundant estate which by the terms of the will was to pass to *Mrs. Lupinski* charged with the duty on her part to pay her three sisters the sums mentioned. Indeed, affirmative evidence drawn out by plaintiffs tends to establish existence of a recognized debt, the property of the estate, more than sufficient to accomplish this result. Declarations consistent with a mere promise on the part of the grantee that certain sums shall be paid are of themselves, alone, insufficient to establish that a reservation or condition to such effect was intended to have been incorporated in a deed. Further than this the evidence does not go. The finding recited in the statement of facts is therefore not only contrary to the clear preponderance of the evidence, but wholly without evidence to support it.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

BARDEEN, J., took no part.

MILWAUKEE BRICK & CEMENT COMPANY, Respondent, vs. SCHOKNECHT, Appellant.

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108 115 457 [2] 17

December 7, 1900 — January 8, 1901.

Corporations: Subscriptions to stock: Right of action: Fraudulent representations: Powers of directors.

1. In an action by a corporation to recover a balance due upon a subscription to its capital stock, the complaint alleged and the answer admitted, in effect, that at the time of such subscription plaintiff was a duly organized corporation, authorized to issue shares of its capital stock and to receive subscriptions therefor. *Held*, that this authorized the court to assume that at least one half of the capital stock had been duly subscribed and at least twenty per cent. thereof actually paid in, as required by sec. 1773, Stats. 1898; and that an action on the subscription agreement could be maintained. *Anvil M. Co. v. Sherman*, 74 Wis. 226, distinguished.
2. No statement as to what a corporation will do or intends to do in the future, made to induce a subscription to its capital stock, constitutes a fraud which will be a defense to an action on the subscription contract.
3. A director has no power, unless specially authorized, to bind the corporation by false and fraudulent representations, or even by an express promise.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

For the appellant there was a brief by *Nath. Pereles & Sons*, and oral argument by *G. D. Goff*. They contended, *inter alia*, that until the whole number of shares contemplated and specified in the contract of subscription have been taken, no call can be made, and the contract, whatever it may be, is immature. 1 Cook, Corporations, § 176; *Salem M. D. Corp. v. Ropes*, 6 Pick. 23; *Newburyport Bridge v. Story*, 6 Pick. 45; *Stoneham B. R. Co. v. Gould*, 2 Gray, 278; *Cabbot & W. S. Bridge v. Chapin*, 6 Cush. 50; *Warwick R. Co. v. Cady*, 11 R. I. 131, 137; *Banty v. Buckles*, 68 Ind. 49; *Allman v. H., R. & E. R. Co.* 88 Ill. 521; *Peoria & R. I. R. Co. v. Preston*, 35 Iowa, 115; *Hughes v. Antietam*

Mfg. Co. 34 Md. 318, 332; *Shurtz v. S. & T. R. R. Co.* 9 Mich. 269; *New York, H. & N. R. Co. v. Hunt*, 39 Conn. 75; *Eaton v. Pacific Nat. Bank*, 144 Mass. 260; *Rockland, Mt. D. & S. S. B. Co. v. Sewell*, 78 Me. 167. This common-law rule has been changed by sec. 1773, Stats. 1898; but compliance with that statute is a condition precedent to the right of the plaintiff to recover. *Anvil M. Co. v. Sherman*, 74 Wis. 226. A subscriber does not waive this defense by paying assessments for several years in ignorance of the fact that the governing statute has not been fully observed. 1 Cook, Corporations, § 181; *Morris v. Dorsey*, 48 Md. 461; *Pitchford v. Davis*, 5 Mees. & W. 2.

For the respondent there was a brief by *McElroy & Eschweiler*, and oral argument by *F. C. Eschweiler*. They argued, among other things, that this case is distinguishable from *Anvil M. Co. v. Sherman*, 74 Wis. 226, in that defendant here agreed to pay to an already organized corporation the sum of $100 November 28, 1892, and $50 per month until he had paid a full $1,000. There is no possible opportunity for calls or assessments; he has waived all these by his agreement. 1 Cook, Corporations, § 106; *Estell v. Knightstown & M. T. P. Co.* 41 Ind. 174; *Breedlove v. M. & F. R. Co.* 12 Ind. 114; *Morrison v. Dorsey*, 48 Md. 461; *Phœnix W. Co. v. Badger*, 67 N. Y. 294. In *Anvil M. Co. v. Sherman* the subscription was made at the time of incorporation; in the case at bar, at a time when the plaintiff was a "going" and existing corporation. In that case the subscriber had only paid the first or preliminary instalment; here defendant paid a number, for a long period of time. There the agreement was expressly conditioned upon calls or special action by the plaintiff; here nothing of that kind. *Shick v. Citizens' E. Co.* 15 Ind. App. 329.

Cassoday, C. J. This action is brought to recover the balance due on a subscription to the capital stock in the

plaintiff corporation. The complaint alleges, in effect, that November 28, 1892, the plaintiff was a duly organized corporation, organized and existing under the laws of this state, and authorized to issue shares of its capital stock and to receive subscriptions in payment therefor, and to do business in the manufacture of clay and cement products and in buying and selling real estate and doing all other acts and things necessary and proper for the carrying on of the business aforesaid, and has existed as such ever since; that November 28, 1892, the defendant executed and delivered to the plaintiff his certain subscription for four shares, each of the par value of $250, of the capital stock of the plaintiff; that in and by such subscription the defendant further agreed to pay $100 November 28, 1892, and the further sum of $50 per month until the full amount of $1,000 had been paid; that thereafter, and on November 28, 1892, the plaintiff accepted such subscription for four shares of the capital stock of the company, amounting in all to $1,000, and in pursuance of such contract and agreement and subscription the defendant paid on account thereof $150 November 28, 1892, $50 January 31, 1893, and $100 March 21, 1893, but had paid no other or further sum on account thereof; that although $700 became due and payable in such instalments on the 28th day of each and every month subsequent to March 28, 1893, until the balance should be paid, making the last payment thereof due and payable May 28, 1894, there was and is due and unpaid on account of such subscription $700, with interest thereon from the several dates therein stated. Judgment was demanded for that amount with interest, costs, and disbursements.

The defendant, by his answer, admitted that the plaintiff is a corporation duly organized and existing under and by virtue of the laws of this state, as set out in the complaint; that the plaintiff was a corporation, existing as such, November 28, 1892; that it has continued to be, and now is, a

corporation organized and existing, as more specifically set out and alleged in the complaint; that he agreed to pay the sum of $100 November 28, 1892,— but expressly denies that he agreed to pay the further sum of $50 per month until the full amount of $1,000, or any other amount, was fully paid; that he paid to the plaintiff $100 November 28, 1892, $50 January 31, 1893, and $100 March 21, 1893; and, except as so admitted, the defendant denies each and every allegation therein contained. For a separate defense, embodying all the allegations of the preceding defense, the answer alleged, in effect, that on and before November 28, 1892, the plaintiff did represent to the defendant that it was a corporation organized and existing, among other things, for the purpose of manufacturing clay and cement, and expressly represented to the defendant that the plaintiff intended to erect, build, and complete a plant or works suitable for the manufacture of cement, and that, to fully equip and complete such plant, it would be necessary to engage the services of a mason contractor to do certain work in and about the erecting, completing, and equipping such works and certain cement and limekilns connected therewith; that it was expressly understood and agreed by and between the plaintiff and the defendant that the plaintiff would erect, build, and equip such plant as aforesaid if the defendant would subscribe to its capital stock to the amount of four shares thereof; that the plaintiff, in order to induce him to subscribe to its capital stock, submitted to him, before he had subscribed or agreed to subscribe, certain plans and drawings of such proposed cement plant or works, designed and drawn for it by its architectural engineers; that in consequence of such representations, and in reliance thereon, he subscribed for such four shares of capital stock, and paid his subscriptions thereto, in the several amounts and on the several dates stated; that it was understood and agreed, as a part of such subscription agreement, that the payment of

the same was conditioned upon the erection, building, equipping, and operating such plant; that the plaintiff never erected, built, or equipped such cement works, or engaged at any time in the business of manufacturing cement, but has wholly abandoned its plans of erecting and operating such cement works, though frequently requested so to do.

The answer also contains two counterclaims, each based upon the defensive matter so admitted and alleged,—one for $300 damages, based upon a representation and promise made by the plaintiff before the defendant subscribed for such stock to the effect that if he would so subscribe the plaintiff would build, erect, equip, and operate a plant for cement works according to the plans and drawings theretofore made, but which the plaintiff failed to perform; and the other for $1,500 damages, based upon the representations made by the plaintiff before the defendant signed such subscription to the effect that it intended to erect and operate such plant, and that if the defendant would so subscribe the plaintiff would, in consideration thereof, award, let, and give to the defendant the contract for doing the mason work, but which the plaintiff failed to perform.

The plaintiff, replying, denies each and every allegation of the respective counterclaims.

Upon the trial the plaintiff, with leave of the court, amended its complaint by alleging that in addition to the amounts alleged to have been paid by the defendant there was a further sum of $200 paid November 17, 1894, and amended the prayer for judgment by making the same for $500, with interest thereon from November 17, 1894. At the close of the trial the jury, by direction of the court, returned a verdict in favor of the plaintiff for $500, with interest thereon from November 17, 1894. From the judgment entered thereon for that amount and costs the defendant brings this appeal.

Error is assigned because at the close of the testimony

the court refused to direct a verdict in favor of the defendant. This is urged upon the ground that the complaint fails to state a cause of action, and that such defect is not cured by the evidence. The defendant contends that, until the whole number of shares contemplated and specified in the contract of subscription have been taken, no call can be made. In the early case in Massachusetts which counsel for the defendant cites as the leading case on the subject, the act creating the corporation provided that the capital stock should be divided into 5,000 shares, not exceeding $100 each, and that after 1,000 shares should be subscribed a meeting of the proprietors might be called, at which any acts might be done "for the purpose of organizing the corporation and arranging its affairs," and it was "held that no legal assessment could be made for the *general* objects of the act of incorporation until all the shares should have been subscribed for, but that an assessment laid to defray preliminary expenses incurred in obtaining the act of incorporation and ascertaining the practicability and utility of the enterprise would be valid," and that the subscribers were personally liable for such assessment. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. 23. The subscription in that case required the subscribers "to pay all such legal assessments on each of said shares as shall be made by the future government of said corporation, *after* the same shall have been organized according to said act." The decision is to the effect that defendant was only liable according to the terms of his subscription and the act creating the corporation. In another case cited by the defendant it was held that "when the number of shares in the stock of a corporation is fixed by its charter, an assessment made before the whole number of shares is subscribed for is invalid." *Stoneham B. R. Co. v. Gould*, 2 Gray, 277. These cases fairly illustrate the position of the defendant's counsel. But it has also been held in that state that "a railroad corporation authorized by its

charter to commence the construction of its road whenever a given number of shares has been subscribed for, can assess the shares when the subscriptions have reached that number, although the whole number of shares has not been determined. *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79. And that rule has been expressly sanctioned by the same court in the later case cited by the defendant's counsel. *Eaton v. Pacific Nat. Bank*, 144 Mass. 274, 275, citing other cases. So in another case cited by counsel for the defendant it is held that "where, in a subscription to the stock of a corporation, a subscriber promises, without any condition, to take and pay for a certain number of shares at the par value therein named, the promise is binding, even though the amount of the capital stock was not fixed and the minimum number of shares named in the charter were not subscribed for." *Skowhegan & A. R. Co. v. Kinsman*, 77 Me. 370.

The difficulty with the defendant's contention is that it is not supported by any adjudication cited by him and applicable to the facts of this case. Here the complaint expressly alleges that November 28, 1892, the plaintiff was a duly organized corporation and existing under the laws of this state, and authorized to issue shares of its capital stock and to receive subscriptions in payment therefor, and to do the business stated, and do all other acts and things necessary and proper for the carrying on of such business; that the defendant subscribed as stated, and that the plaintiff accepted such subscription; and that the defendant had paid thereon one half of the amount of such subscription. The answer not only fails to deny the corporate existence of the plaintiff as provided by statute (sec. 4199, Stats. 1898), but expressly admits that November 28, 1892, the plaintiff was a corporation duly organized and existing under and by virtue of the laws of this state, and that it continued to be and now is a corporation organized and existing, as more spe-

cifically set out and alleged in the complaint. Of course, the statute applicable necessarily enters into the contract and binds the parties. Counsel for the defendant cite and seem to rely upon *Anvil M. Co. v. Sherman*, 74 Wis. 226, where it is held that "No call or assessment, subsequent to the preliminary one, upon the subscription to the capital stock of the corporation can be made unless, in compliance with sec. 1773, R. S., at least one half of the stock has been subscribed, and at least twenty per cent. thereof actually paid in. And this is so even though the subscriber agreed 'to pay the balance on each share at such times and in such instalments as the same *shall be called for* by said corporation.' In an action to recover *a call or assessment* the complaint must aver compliance with said sec. 1773, R. S." But that case is clearly distinguishable from the case at bar, since this is not an action to recover a call or assessment, but an action upon an express contract. *Estell v. Knightstown & M. T. P. Co.* 41 Ind. 174; *Morrison v. Dorsey*, 48 Md. 461; *Phœnix W. Co. v. Badger*, 67 N. Y. 294; *Shick v. Citizens' E. Co.* 15 Ind. App. 329. True, the statute referred to in that case declares that "no such corporation shall transact business with any others than its members until at least one half of its capital stock shall have been duly subscribed, and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof the corporation offending shall have no right of action thereon." R. S. 1878, sec. 1773. The allegations of the complaint, raised in the manner indicated, must be liberally construed; and such allegations, with the admissions in the answer, take the case out from the prohibition of the statute, and authorized the court to assume that at least one half of the capital stock had been duly subscribed, and at least twenty per cent. thereof actually paid in. We must hold, upon the admitted facts, that the defendant is liable on his subscription.

Error is assigned because the court held that the burden was upon the defendant to prove that the single director in the plaintiff company, mentioned, had authority to bind the plaintiff in the representation alleged in the counterclaim, to the effect that the plaintiff would construct a certain plant or works. Counsel for the defendant contend that such representation was a fraud upon the defendant. But no statement as to what would be done or was intended to be done *in the future* constitutes a fraud. To be such, it must relate to a present or past state of facts. *Patterson v. Wright*, 64 Wis. 289; *Sheldon v. Davidson*, 85 Wis. 138; *Louis F. Fromer & Co. v. Stanley*, 95 Wis. 64; *Field v. Siegel*, 99 Wis. 609. But a director had no power, unless specially authorized, to bind the corporation by false and fraudulent representations, or even by an express promise. *C. & N. W. R. Co. v. James*, 22 Wis. 194; *Morris v. Griffith & W. Co.* 69 Fed. Rep. 131; *Bradlee v. Warren F. C. S. Bank*, 127 Mass. 107; *Holden v. Phelps*, 135 Mass. 61. There is nothing in the record to warrant a recovery by the defendant upon either of his counterclaims. We must hold that the verdict was properly directed in favor of the plaintiff.

By the Court.— The judgment of the superior court of Milwaukee county is affirmed.

BARDEEN, J., took no part.

GORES, Administrator, Respondent, vs. ELLIOTT, imp., Appellant.

December 7, 1900 — January 8, 1901.

Banks and banking: Negligence and fraud of officers: Pleading.

In an action by a creditor of a bank against its officers to recover property alleged to have been lost by their negligent and fraudulent mismanagement of its business, the complaint must allege as to each defendant that he was an officer of the bank when the acts complained of took place.

APPEAL from an order of the circuit court for Milwaukee county: JAMES J. DICK, Judge. *Reversed.*

This is an appeal from an order overruling a separate demurrer of the defendant *Elliott* to the same complaint which was passed upon by this court in the case of *Gores v. Day*, 99 Wis. 276. As stated in the opinion in that case, the action is an equitable action, brought by a creditor of the Plankinton Bank, an insolvent state banking corporation, to recover from the directors of said bank moneys and property of the corporation alleged to have been lost by the negligence and fraud of defendants, as officers of the corporation, in their management of the corporate business. No more extended statement of the complaint here is deemed to be necessary. The demurrer of the defendant *Elliott* assigned several grounds, and, among others, the general ground that no sufficient facts were stated in the complaint to constitute a cause of action as to the defendant *Elliott*.

C. T. Hickox, for the appellant.

For the respondent there was a brief by *Mock, Riley, Wittig & Schinz* and *G. J. Cox*, attorneys, and *Moritz Wittig*, of counsel, and oral argument by *Moritz Wittig* and *J. B. Doe.*

WINSLOW, J. This is an action against the officers of a bank to recover property lost, as alleged, by their negligent and fraudulent mismanagement of its business. Necessarily, it must be alleged in such a complaint that any party who is made a defendant was an officer of the bank when the acts complained of took place. Careful reading of this complaint shows that nowhere is it alleged that the defendant *Elliott* was at any time an officer of the insolvent bank. His name appears nowhere in the complaint save in the title. It may be reasonably inferred, perhaps, from the allegations, that *Mr. Elliott* was a stockholder of the bank, although that fact is not directly alleged; but it cannot be inferred that he was a director, because the directors are

specifically named and *Mr. Elliott's* name does not appear in the list; nor is it alleged that he was an officer of any kind. All the acts and defaults charged against the defendants are necessarily official acts, and consequently the general allegation, frequently repeated in the complaint, that "the defendants, as directors and officers" of the bank, did or omitted to do certain acts, can only be reasonably construed as referring to the defendants who are alleged to have been directors or officers of the bank. These considerations render necessary the sustaining of *Mr. Elliott's* demurrer, without reference to other questions raised; and, as these questions are considered and decided in the case of *Gores v. Field* (decided herewith), 109 Wis. 000, it is unnecessary to discuss them here.

By the Court.— Order reversed, and action remanded with directions to sustain the demurrer.

BARDEEN, J., took no part.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant, vs. BRADLEY and others, Respondents.

108	467
114	[7]113
108	467
116	[7]460
108	467
117	[6]119
117	[6]300

December 7, 1900 — January 8, 1901.

Injunctional order: Dissolution: Appeal: Stay: Discretion.

1. Secs. 3069, 3042, Stats. 1898, give the right of appeal from an order granting, refusing, modifying, or dissolving an injunction, and limit the time for taking the appeal to thirty days from the date of the service, by either party to the action upon the other, of a copy of the order with a written notice of the entry of the same.
2. Sec. 3061, Stats. 1898, permits the trial court to stay the effect of an order of the kind above referred to on an appeal therefrom if, upon the making of the order, immediate notice of the appeal be given and within three days thereafter the appellant serves an undertaking upon the adverse party as therein provided.

3. Sec. 3061, Stats. 1898, relates to the condition upon which an order appealed from may be continued pending the appeal, and does not affect the right of appeal or the time within which such right must be exercised.
4. *Punch v. New Berlin*, 20 Wis. 189, was overruled by *Couldren v. Caughey*, 29 Wis. 317, which is in harmony herewith.
5. It is a general but not a universal rule that where all the equities of the complaint upon which a temporary injunction has been granted are specifically and positively denied by verified answer, the injunction will be dissolved.
6. Such general rule does not apply where a continuance of the injunction is reasonably necessary for the protection of the rights of either party to the litigation during the pendency thereof.
7. If it be clear that the plaintiff may probably recover, and that if he be left at the mercy of his adversary pending the litigation the purpose of such litigation may be defeated or he may probably suffer irreparable loss, it is within judicial discretion to so control the situation as to prevent that result so far as practicable, having regard for the probable rights of the defendant as well as those of the plaintiff.
8. There is no arbitrary rule that displaces judicial discretion to control the conduct of parties to litigation so the purpose thereof will not be materially jeopardized. A refusal to exercise such power where there is clear necessity for it is either a misconception of judicial duty or an abuse of it.

[Syllabus by MARSHALL, J.]

APPEAL from orders of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Reversed.*

Action to restrain defendants from interfering with plaintiff's business by endeavoring to ride upon its street cars without paying the fare demanded pursuant to its lawful regulations, and to judicially establish the validity of such regulations; also to enjoin the prosecution of numerous suits brought against the plaintiff growing out of its enforcing such regulations, and to enjoin the commencement of further suits of the same character.

The facts stated in the complaint are in substance as follows:

Plaintiff is a duly organized and existing corporation under

the laws of the state of Wisconsin and as such possesses all the usual powers of a street-car company, in respect to owning, maintaining, and operating a street-car line from a point at the western limits of the city of Milwaukee to and through the city of Wauwatosa, and to determine the compensation to be charged for services rendered, within reasonable limits and according to public franchises upon which its rights depend. Pursuant to franchises which plaintiff was and is empowered to exercise, it has operated and is operating a railway line from the western limits of the city of Milwaukee westerly on Wells street through the town of Wauwatosa to the corporate limits of the city of that name, thence in a west, north, and northwest course in such city to the center line of Main street therein, and to a point beyond and west of the limits of such city.

Pursuant to such franchise plaintiff has established a reasonable compensation to be paid by persons receiving the benefits of travel by means of its cars on the road mentioned, to wit: Five cents for a trip from any point on the line in the city of Wauwatosa to the Hawley road, which crosses plaintiff's railway line about seventy rods east of the easterly limits of said city, and a second fare of five cents for a continuation of the trip to any point in the city of Milwaukee reached by the plaintiff's system of street-railway lines; five cents for the passage from any point on the Wells street line in the city of Milwaukee to the Hawley road, and an additional fare of five cents for a continuation of the passage to any point west of said road reached by either of plaintiff's lines in the city of Wauwatosa; five cents for the passage from any point on the line at or west of the westerly limits of the city of Milwaukee to the Hawley road, and an additional fare of five cents for a continuation of the passage to any point on said route west of such road; five cents for the passage from any point on the line between the division point at the Hawley road and the westerly limits of the city

of Milwaukee to the westerly limits of the city of Milwaukee, and an additional fare of five cents for a continuation of the passage to any point within the city of Milwaukee. The Hawley road crossing was determined by plaintiff to be the most convenient and just division point for making an additional charge of five cents, having regard to the convenience of its customers and the orderly conduct of its business.

On September 18, 1899, defendant *Bradley*, while a passenger on one of plaintiff's cars, refused to pay the additional fare of five cents after reaching the point of division mentioned, and was thereupon compelled to leave the car, no unnecessary violence being used to that end. On October 20, 1899, said *Bradley* commenced an action in justice's court against plaintiff to recover damages for his ejection from the car, upon the theory that plaintiff had no right to charge him the additional fare, and such proceedings were thereafter had in such action that on December 6, 1899, judgment was rendered in his favor for $49.43, from which an appeal was duly taken to the superior court of Milwaukee county, where the action is now pending. On December 21, 1899, said *Bradley* was again ejected from one of plaintiff's cars under circumstances the same as in the first instance, and on December 29th he commenced an action before a second justice of the peace, founded on a second alleged violation of his rights, which action is still pending. On December 27, 1899, said *Bradley* was a third time ejected from one of plaintiff's cars under circumstances the same as before, and he thereupon commenced a third action for damages before a third justice of the peace, which action is still pending; and he also instituted criminal actions before the same justice, against the conductor of the car and the motorman thereof, for assault and battery, which said actions are still pending.

All of the actions mentioned except the first were instituted for the purpose of vexing and annoying the plaintiff.

Such first action was amply sufficient to test the right of the controversy between plaintiff and its patrons in respect to the lawfulness of the additional fare demanded by it.

Since December 27, 1899, defendant *Bradley* has refused to pay the disputed fare for being carried as a passenger on plaintiff's cars, and has given and is giving out that he will not pay the same, and that each time plaintiff's servants deny him the privilege of riding without paying such fare he will institute an action for damages in justice's court, or institute criminal proceedings against plaintiff's servants, or both, as the facts from his standpoint may warrant. Neither the actions already commenced nor such actions and any others that may be commenced can be consolidated, from the fact that such pending actions are in different jurisdictions. Plaintiff will be put to great and useless expense and annoyance in trying a large number of independent actions each involving the same question, and will suffer great and irreparable loss if compelled to do so. A single action is all that is necessary to settle the entire controversy.

Plaintiff is informed and believes that *Bradley* justifies his conduct upon the claim that some ordinance or ordinances passed by the city or the town of Wauwatosa, granting certain rights to the Milwaukee Heat, Light & Traction Company or some other company, upon which plaintiff's right to operate the railway line in question depends, require the plaintiff to charge but a single fare for a single trip over its entire line west of the westerly limits of the city of Milwaukee.

The conduct of said *Bradley* has caused the other defendants mentioned to refuse to pay the fare demanded in accordance with plaintiff's regulations. All the defendants have confederated and agreed together to refuse to pay the additional five-cent fare, and have accordingly so refused, and such refusals have in some cases resulted in the persons refusing being ejected from the cars. The defendants have

given out that they will continue refusing to comply with plaintiff's regulations as to the additional five-cent fare, and if ejected from its cars will follow the example of *Bradley* as to the commencement of civil and criminal actions. Such conduct, if allowed to continue as threatened, will so disturb plaintiff's business, and cause persons otherwise willing to pay the additional fare demanded to refuse to do so, as to inflict upon it irreparable injury.

The relief prayed for was as indicated in the stated purpose of the action. The complaint was verified, and upon a bond being given to secure the defendants from injury in case it should finally be determined that plaintiff was not entitled to the relief prayed for in the complaint, a temporary injunction was granted by a circuit court commissioner, restraining each and all of such defendants from doing any of the things complained of, including the prosecution of any of the actions for damages mentioned and the criminal actions, pending the final determination of this action.

Defendants *Bradley*, *Story*, *Perry*, *Wheeler*, *Laflin*, *Morse*, and *Gregg* answered jointly, admitting that plaintiff was lawfully operating a railroad line as alleged, but denied that it had the right to collect the disputed five-cent fares. The answer alleged in detail that plaintiff's rights as to fares are so limited that it cannot lawfully collect more than one five-cent fare for a single trip over any part of its line west of the westerly limits of the city of Milwaukee; that its insistence upon the right to collect two such fares is a violation of the rights of defendants; that the conduct of defendant *Bradley* was according to his legal rights; and that the actions commenced by him were commenced solely to vindicate such rights and not for the purpose of harassing or vexing plaintiff. The circumstances alleged as to the commencement of actions and the status thereof were all admitted, except it was said that the ejection from the car the last time was not preceded by any demand for the payment

of an additional five-cent fare or any refusal to pay such fare. It was admitted that each of the defendants had insisted and did insist that he possessed the right to use plaintiff's cars for travel without paying the disputed fare, and it was alleged that, except as to *Bradley* and *Story*, defendants had been permitted to ride without paying such fare upon their asserting to plaintiff's servants in charge of the car the right so to do. It was further admitted, in effect, as to each him the disputed fare or to deny him the right to ride on defendant, that he considered that any attempt to collect of plaintiff's cars unless he paid according to its demand for such fare was an invasion of his rights and gave him a cause of action for damages and justified him in commencing a criminal action in the event of his being forcibly ejected from the car. It was further admitted that plaintiff had been compelled to employ men for the sole purpose of enabling it to operate its cars and enforce the payment of the additional five-cent fares.

To support the allegations that the conduct of plaintiff in refusing the use of its cars except upon condition of the payment of the disputed fare was unlawful, the answer alleged that plaintiff's rights are measured by a franchise formerly owned by the Milwaukee & Wauwatosa Motor Railway Company, covering that part of its route between the westerly limits of the city of Milwaukee and the easterly limits of the city of Wauwatosa, and a franchise granted by the city of Wauwatosa to the Milwaukee Light, Heat & Traction Company, September 5, 1899, for that part of its line in the city of Wauwatosa, the road, however, having been theretofore constructed and put in operation. The terms of the first-mentioned franchise, as regards railway fares, do not appear by the answer. A copy of the last-mentioned franchise was made a part of the answer, but it contained no provision limiting the authority of the grantee in respect to railway fares unless there was such limitation in this clause: "The rights

hereby granted are expressly granted subject to all the duties and obligations mentioned and described in an ordinance of the town board of Wauwatosa dated May 11, 1891, to the Milwaukee & Wauwatosa Rapid Transit Company." A copy of the ordinance of May 11, 1891, was made a part of the answer. It contained this provision: "The rate of fare for any distance upon the railroad of said company from the city limits of the city of Milwaukee to the terminus of said company in the town of Wauwatosa shall not exceed five cents." That franchise covered a route connecting with one of the Milwaukee city street-car lines now part of plaintiff's system, running westerly from the westerly boundary line of the city of Milwaukee, for most of the way parallel with and about one half mile north of the route particularly involved in this action, to a point on the westerly side of the city of Wauwatosa. The road, as operated, bends southwesterly before reaching the terminus, so as to reach a point a few rods from the terminus of the southern route. The branches reach the point of intersection of franchise rights, but no connection between the two lines as constructed exists.

It was alleged that the fare on the entire northern line has always been five cents and no more, except for a short interval when there was an attempt to make a division for the collection of an additional five-cent fare at a point about one quarter of a mile west of the westerly limits of the city of Milwaukee instead of at said limits; but that upon plaintiff's attention being called to the quoted language in its franchise it desisted from such attempt as to all persons using only the line or a part of it west of the westerly limits of the city of Milwaukee.

It was further alleged that the regular fare was five cents on the entire southern route up to September 11, 1899, at which time plaintiff arbitrarily changed the rate by fixing a division point at the intersection of the route with the Hawley road, as indicated in the complaint. There were

further allegations to the effect that there was no good reason for making such change; that it does not serve any valuable purpose to plaintiff and is very prejudicial to the patrons of the railway line in the town and city of Wauwatosa, as it makes all who desire to travel on the line from any point east of the Hawley road to a point west of it, or from a point west of it to a point east of it, without in either case crossing the westerly boundary of the city of Milwaukee, pay two five-cent fares; and there are many persons so circumstanced that they are required to so travel, and that such is the case with defendants. The answer closed with a prayer for affirmative relief, including a dissolution of the temporary injunction and a permanent injunction against plaintiff's denying to defendants the use of its cars for travel without paying the disputed fare, and for temporary relief to that effect to last during the pendency of the action.

Defendants *Tomkins*, *Landolt*, and *Wright* answered separately in all essential particulars the same as *Bradley* and his associates. Defendant *Nethercut* answered to the effect, among other things, that he had not refused to pay the disputed fare nor had any dispute with plaintiff in regard to the matter in controversy, and that he had no interest in the litigation other than that of the citizens generally of the town and city of Wauwatosa. He further, by his answer, maintained the right of persons to refuse to pay the disputed fare, and the rights of the other defendants as alleged in their answers.

Five motions were made, corresponding to the five answers, to dissolve the temporary injunction. On such motions, in addition to the pleadings referred to, the following affidavits were read:

Affidavits by several members of the common council of the city of Wauwatosa and the mayor thereof, to the effect that in granting the franchise of September 5, 1899, they each and all believed that it required the grantee to permit

the use of its cars for a single five-cent fare for a trip over any part of the route either way between the westerly line of the city of Milwaukee and the westerly terminus of such route near the entrance to the Milwaukee county hospital for the insane west of the westerly boundary of the city of Wauwatosa.

The motions were opposed on the verified complaint, the several answers, and the following:

An affidavit by T. E. Mitten, superintendent of the operating department of plaintiff's business, to the effect that the change in the place of collecting the additional five-cent fare, from the westerly boundary line of the city of Milwaukee to the Hawley road, was a judicious change, having regard to the best interests of the patrons of the line in a general way, and the most reasonable arrangement for the conduct of that branch of its business, as well. Further, that the Milwaukee & Wauwatosa Motor Railway Company originally built the railway line which forms a part of the route in question, and that plaintiff is maintaining and operating that part of its route under the rights formerly possessed by such company and not under any franchise from the town or city of Wauwatosa.

An affidavit by Mitten to the effect that defendant *Nethercut* was joined as defendant because plaintiff was credibly informed that he was active in promoting the idea that its conduct in collecting the additional fares was illegal and need not be submitted to by its patrons, and that he made a statement which was published in one of the city newspapers, to the effect that the charter granting the right of way for the railway line expressly specified that the company could not collect more than one five-cent fare between the westerly limits of the city of Milwaukee and the westerly terminus of the line; that he had stated that the people of the community of which he was a member were fighting for a principle and actuated by the same spirit that led the colonists to throw tea overboard in Boston Harbor.

An affidavit by F. H. Whitney, secretary of plaintiff, presenting a map of plaintiff's two lines of street railroad in the city and town of Wauwatosa, and copies of papers showing that its right to operate a continuous line of railroad from the westerly limits of the city of Milwaukee on Wells street to the city of Wauwatosa is based on a franchise granted by the town board of Wauwatosa, June 4, 1891, to the West Side Railway Company, to extend what is now the Wells street line in the city of Milwaukee from the westerly limits of the city a very short distance to an intersection with Thirty-Sixth street; that such franchise obligated the grantee to include such extension in the line of railway of which it was to form a part, charging the same fare for a trip on any part of the continuous line; that the balance of the line, forming a continuous line to the city limits of Wauwatosa, was covered by a franchise acquired by the Milwaukee & Wauwatosa Motor Railway Company to construct and operate a railway line under the general railroad laws of the state.

An affidavit by John I. Beggs, plaintiff's manager, to the effect that plaintiff has not at any time charged to its patrons a greater fare than five cents for a trip from any point in the city of Wauwatosa to any other point in said city; nor from any point on the route covered by the franchise of September 6, 1899, to any other point on said line, or any point on the line covered by the franchise of May 11, 1891, or the extension of such franchise by the franchise of July 2, 1896, or the franchise of April 24, 1899; that it was his understanding of the franchise of September 6, 1899, that it was to have the effect of extending the franchise of May 11, 1891, so as to make the line covered by the two franchises in effect one line for the collection of a single five-cent fare; and that, in accordance therewith, at the terminus of the line as mentioned in the franchise of September 6, 1899, a transfer point had been established so that passengers could

be transferred from the northern route to the southern route, taking the benefit of both routes for a single fare of five cents.

The several motions to vacate the temporary injunction were granted, and such proceedings were thereafter had that the orders accordingly entered were brought to this court on appeal for review, and the temporary injunction was continued pending such appeal.

For the appellant there was a brief by *Miller, Noyes & Miller*, and oral argument by *Geo. H. Noyes*. They argued, among other things, that equitable jurisdiction can be invoked to protect a franchise or other valuable right as against those who deny such franchise or right or who seek to injure or destroy it. *Milwaukee E. R. & L. Co. v. Milwaukee*, 95 Wis. 39; *Fox River F. & P. Co. v. Kelley*, 70 Wis. 287; *Grand Rapids W. P. Co. v. Bensley*, 75 Wis. 399; *Kaukauna W. P. Co. v. Green Bay & M. C. Co.* 75 Wis. 385; *Mobile v. L. & N. R. Co.* 84 Ala. 115; *Croton T. P. Co. v. Ryder*, 1 Johns. Ch. 611; *Burlington v. Schwarzman*, 52 Conn. 181; *Keystone B. Co. v. Summers*, 13 W. Va. 476; *Williams v. Citizens' R. Co.* 130 Ind. 71. As to the rights of railway companies and the proper course to be pursued by passengers when disputes like this arise, see *Yorton v. M., L. S. & W. R. Co.* 54 Wis. 234; *S. C.* 62 Wis. 367; *Ellis v. Milwaukee City R. Co.* 67 Wis. 135; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Hall v. M. & C. R. Co.* 15 Fed. Rep. 57; *Hufford v. G. R. & I. R. Co.* 53 Mich. 118; *Bradshaw v. South Boston R. Co.* 135 Mass. 407; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich. 277. Jurisdiction in equity will be sustained when time, expense, and a multiplicity of suits will be saved by it and the rights of all concerned will be settled in one litigation. *Gullickson v. Madsen*, 87 Wis. 19; *Fox River F. & P. Co. v. Kelley*, 70 Wis. 287; 1 Pomeroy, Eq. Jur. § 245 *et seq.; Third Ave. R. Co. v. New York*, 54 N. Y. 159; *Norfolk & N. B. H. Co. v. Ar-*

nold, 143 N. Y. 265; *De Forest v. Thompson*, 40 Fed. Rep. 375; *Osborne v. Wis. Cent. R. Co.* 43 Fed. Rep. 824; *Sang Lung v. Jackson*, 85 Fed. Rep. 502. The principle that a bill in equity will lie to prevent a multiplicity of suits applies as well to proceedings of a criminal nature. *Mayor v. Pilkinton*, 9 Mod. 273; *Louisiana S. L. Co. v. Fitzpatrick*, 3 Woods, 222; *Shinkle v. Covington*, 83 Ky. 420; *Atlanta v. Gate City G. L. Co.* 71 Ga. 106; *Spink v. Francis*, 19 Fed. Rep. 670; *S. C.* 20 Fed. Rep. 567; *Klein v. Livingston Club*, 177 Pa. St. 224; *Vegelahn v. Gunther*, 167 Mass. 92; *Mobile v. L. & N. R. Co.* 84 Ala. 115; *Forcheimer & Co. v. Mobile*, 84 Ala. 126; *Montgomery v. L. & N. R. Co.* 84 Ala. 127.

For the respondents there was a brief by *Wheeler & Perry*, attorneys for *Bradley*, *Story*, *Perry*, *Wheeler*, *Laflin*, *Morse*, and *Gregg;* a brief by *Turner*, *Pease & Turner*, attorneys for *Tompkins*, *Landolt*, and *Wright;* and a brief by *Nickerson*, *Roemer & Aarons*, attorneys for *Nethercut;* and the cause was argued orally by *Lynn S. Pease* and *C. B. Perry*.

MARSHALL, J. A jurisdictional question is presented on facts that do not appear in the foregoing statement. Subd. 3, sec. 3069, Stats. 1898, which in the beginning was sec. 10, ch. 264, Laws of 1860, gives the right of appeal from an order granting, refusing, modifying, or dissolving an injunction. Sec. 3042, Stats. 1898, which in the beginning was part of sec. 9 of said ch. 264, limits the time for taking an appeal from such an order to thirty days from the date of the service by either party to the action upon the adverse party of a copy thereof with a written notice of the entry of the same. Sec. 3061, Stats. 1898, which in the beginning was sec. 19 of said ch. 264, and sec. 2, ch. 139, Laws of 1861, provides that when a party shall give immediate notice of appeal from an order dissolving or modifying an injunction he may, within three days thereafter, serve an undertaking on the adverse party, containing certain specified provisions,

executed on his part by at least two sureties, in such sum as the court or presiding judge thereof shall direct, and that thereupon he shall be entitled to an order continuing the injunction. In this case the notice of appeal was not given till nine days after the making of the orders appealed from. Because of that delay respondents' counsel say the requirements of sec. 3061 were not satisfied and therefore this court has not obtained jurisdiction and should dismiss the appeal. Reliance is placed on *Punch v. New Berlin*, 20 Wis. 189, which fully supports counsel's contention. However, the case was wrongly decided, as was very soon discovered. It pretty satisfactorily appears that the motion there to dismiss the appeal was not based on the ground upon which the dismissal took place, but on the fact that the appeal was from a chambers order. We find the case several times cited in the reports on that subject, but not cited in any subsequent opinion rendered to support the proposition that compliance with sec. 3061 is jurisdictional. The court evidently overlooked the fact that the section requiring immediate notice of the appeal has reference mainly to the condition upon which the appellant is entitled to an order continuing the injunction, and that the right of appeal and the termination of that right are governed by other and entirely independent sections. In *Couldren v. Caughey*, 29 Wis. 317, the jurisdictional question was again presented, relying upon *Punch v. New Berlin*, and the motion to dismiss was denied, such case being squarely overruled though without any mention of it in the opinion. The statement made by the reporter in the published report says that the moving party relied upon *Punch v. New Berlin*. One would suppose by reading the opinion that the court was dealing with an original question. That probably accounts for the early case appearing in the various existing tables of cases with no indication of its having been overruled. Attention is called to the later case in the syllabus to the early case in the an-

notated edition of the reports, but not in such a way as to indicate that it was overruled. What has been said sufficiently answers the suggestion that the appeal should be dismissed for want of jurisdiction. *Punch v. New Berlin* is not, but *Couldren v. Caughey* is, the law of this state on the subject considered.

From the statement of facts it will be observed that the legal right of plaintiff to demand the disputed fares, as a condition of travelers' enjoying the benefits of its railway service, turns on the meaning of the ordinance of September 5, 1899. While such ordinance does not in terms cover or in any way refer to that part of the Wells street line west of the westerly limits of the city of Milwaukee and east of the easterly limits of the city of Wauwatosa, the claim is put forth as we understand it, as the justification for defendants' conduct, that the purpose of such ordinance, among other things, was to limit the right of the grantee of the franchise to a single five-cent fare for a continuous trip one way over any part of the entire line in the city and town of Wauwatosa. Proof was made on the motion to dissolve the temporary injunction, as indicated in the statement, that the members of the common council of the city of Wauwatosa so understood the ordinance when it was adopted, and that the officers of the plaintiff had a far different understanding and one entirely consistent with the regulation for the collection of fares, of which defendants complain. Obviously, neither the understanding upon the one side nor that upon the other, independent of the intent of the parties to the ordinance as disclosed by it and the acceptance thereof, in the light of such circumstances as may properly be resorted to in aid of a judicial construction of the papers, if they need such construction, can have any bearing upon the rights of the litigants in this case. Plaintiff's rights and those of the public as well must be measured by the franchises under which the railroad is maintained and operated.

Upon the face of the ordinance of September 5th, there is no warrant that we can discover for defendants' position that it limits or refers in any way to plaintiff's rights as to charges for service on that part of its line east of the city of Wauwatosa. It limits the fares that may be charged for that part of the line west of the easterly limits of said city, and no claim is made that the ordinance in that regard has been violated. In fact it appears that plaintiff's officers have construed the ordinance so as to make that part of the line covered by it and the entire northern line, covered by the ordinance of May 11, 1891, a single line, entitling a person to a trip one way over the whole or any part of it for a single fare of five cents. So, if defendants' contention be correct, that the ordinance limits the fare to five cents for a trip one way over the whole or any part of the Wells street line west of Thirty-Sixth street, that result must be reached by broadening out the letter thereof by judicial construction.

We do not intend at this time to decide the case on its merits; but in order to apply correct principles to the question of whether the trial court exercised sound judicial discretion, or any discretion at all, in dissolving the temporary injunction, we must look into the merits of the case, as disclosed by the record, sufficiently to see whether the right claimed by plaintiff may probably be vindicated by the final decree in the case. It is considered that enough has been said to make such probability apparent and to bring out clearly that only disputed questions of law are involved.

It follows from the preceding that there was presented, on the motions to vacate the temporary injunction, this situation: The right of plaintiff to collect the disputed fares depended upon questions of law arising on undisputed facts. It was engaged in *quasi*-public work that could not be disturbed by daily contests with patrons over its right to the fares demanded, without great and irreparable injury to its interests if it was acting in the right, and great prejudice

to the traveling public desiring the benefit of its service, as well. There was no way for plaintiff to avoid such disturbances pending a judicial determination of the controversy, nor to avoid being harassed with a multitude of suits, civil and criminal, which were entirely useless as regards reaching such determination, except either by an appeal to a court of equity for protection or to temporarily surrender what it believed to be its rights. To avoid the mischief by submission, or to allow the disturbances to continue, could not fail to result in irreparable damage to plaintiff. No proposition was made to protect plaintiff from loss by a bond; no requirement to that effect was made by the trial court as a condition of dissolving the injunction, and the situation was such that there was no practical way of protecting plaintiff against probable loss by that means. The damages that might probably result to defendants by reason of the injunction, in case plaintiff finally failed in the litigation, were trifling and easily indemnified against by a bond on its part given as a condition of the injunction; and the defendants were so protected. The primary right sought to be established was the right to a permanent injunction restraining defendants from doing the things in respect to which their liberty was restrained by the temporary injunction. In such situation the trial court dissolved the injunction unconditionally, leaving plaintiff the alternatives of temporarily surrendering what it believed to be its legal rights and suffering the irreparable loss reasonably certain to follow, or suffering as great or still greater loss by continuing the daily contest with defendants over the subject of fares by reason of its endeavors to enforce its regulations; or of appealing to this court with an interim continuance of the temporary injunction. It chose the latter.

Did the trial court do right under the circumstances stated? That inquiry leads to this other: Why does power in equity exist to control situations pending litigation in re-

gard to the rights involved? The answer to that may be found written in the judicial records of every court and the works of every standard text writer, to the effect that the power is given to be exercised so as to promote the ends of justice. It is a broad discretionary power, essential to a proper administration of justice, and to be used with judgment and consideration for the interests of both parties, and with good common sense, to the end that irreparable loss and useless litigation may be prevented, so far as that can justly be done in advance of a final determination of the rights of the parties.

We are told that the reason for dissolving the temporary injunction in this case is because defendants, by their answers, denied all the equities of the complaint, and the trial court understood that in such a case a temporary injunction, granted before answer, should be dissolved. If that were an absolute rule it would result in a mere denial of the equities of the plaintiff's complaint, regardless of the probability yet remaining of his recovering in the litigation, displacing the discretionary power of the court to protect the plaintiff from the conduct of his adversary pending the litigation. That would be absurd. The general rule is as stated; but courts should not be misled into thinking that it is the universal rule. The idea that a denial by answer of all the equities of the complaint entitles the defendant, as a matter of right, to a dissolution of a temporary injunction, is unsound, though there are so many unguarded judicial expressions in legal opinions, well calculated to induce a contrary view unless one keeps well in mind the underlying principles of equity power in such situations, that it is not strange that courts sometimes act upon the erroneous theory that a denial of all the equities of the complaint displaces judicial discretion. Such principle recognizes that the judicial power to act by temporary injunction is designed to be used in aid of judicial administration in equity, and that it should be

exercised to that end in the sound discretion of the court or judge. The general rule always gives way when the circumstances are such as to require it, rather than that a litigant shall be subjected to serious danger of suffering irreparable loss. That was really the old chancery rule, and our statute (sec. 2774, Stats. 1898), in expressly conferring interim injunctive power on the courts, is supposed to have gone somewhat further than the rule of the old practice. It provides that, "when it shall appear by the complaint that the plaintiff is entitled to the judgment demanded, and such judgment, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done in violation of the plaintiff's rights respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act." In *Trustees German Evangelical Congregation v. Hoessli*, 13 Wis. 348, it was remarked that such section "seems to enlarge the former chancery power over the remedy by injunction." So if there has been ingrafted upon the old equity rule in recent years exceptions not formerly known, which we are not ready to admit, the statute is ample warrant for it.

We reaffirm what was said in *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436, on this subject: The general rule, so often stated, that on the coming in of the answer denying all the equities of the complaint the temporary injunction should be dissolved, ought to be stated with such qualifications as will preclude an understanding that it is universal, leaving no room to exercise judicial power, regardless of the necessities of the case, except to dissolve the injunction. If such were not the case the court would be

vested with discretionary power, yet be so shackled by an arbitrary judicial rule as to take from it every element of discretion. Thus would the arm of equity be paralyzed, though it is reputed to be long enough, when properly used, to lay hold of every situation where legal remedies fail, preventing irreparable mischief and remedying wrongs. It is more accurate and less liable to mislead to state the rule in regard to dissolving a temporary injunction on the coming in of an answer with this qualification: Notwithstanding the conflict between complaint and answer as to the facts or the law, it is still within the discretionary power of the court, by a temporary injunction, to preserve the *status quo* between the parties pending the final decree and to prevent the doing of the acts complained of during such pendency if that be necessary to save the plaintiff or the defendant from irreparable injury by the conduct of his adversary in the meantime. Not only does the discretionary power exist to protect a party against such danger, but the duty exists to exercise it by making some reasonable provision to prevent such injury. In such cases, necessarily, the court should proceed with care, neither arbitrarily refusing to grant or continue an injunction, nor the reverse. The situation of the respective parties should receive careful consideration. If restraint upon the defendant will not subject him to danger of any serious loss and he can be amply secured against that danger by a bond, and without such restraint the plaintiff will be in danger of suffering serious loss that cannot be adequately guarded against by a bond, good judgment may require such restraint with proper conditions. In other situations, a wise administration may demand a different course; but whatever the situation may be, it is in the power of a court of equity to so shape its administration as to reduce the danger of a miscarriage of justice as low as human foresight can do it. A failure to exercise judicial power to protect litigants so far as practicable from probable

loss, upon the theory that there is some arbitrary rule that displaces such power under certain circumstances, is error, and an unreasonable exercise of such power by refusing temporary restraint, where there is a clear necessity therefor, is an abuse of such power.

It seems that if the first error mentioned did not lead to the orders appealed from the other did. The temporary injunction should have been allowed to stand to the extent necessary to prevent useless litigation and a continuance of the conditions complained of pending the trial of this case. Notwithstanding all the equities of the complaint were denied, no serious loss to defendants in any event was probable, and the reverse was true as to plaintiff. If authorities were needed to this, the following amply sustain all that has been said: *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436; Beach, Injunctions, § 307; *Hicks v. Compton*, 18 Cal. 206; 10 Ency. of Pl. & Pr. 1029; *Bowen v. Haskins*, 45 Miss. 183; High, Injunctions, § 1491; *Clum v. Brewer*, 2 Curt. 506; *Morris C. & B. Co. v. Matthiesen*, 17 N. J. Eq. 385.

In the foregoing we have considered only the action of the court in unconditionally vacating the temporary injunction. The conclusion reached does not go to the extent of holding that the injunction, in its entire scope, was proper. On the case made by the record presented on the motions to dissolve the injunction it would have been proper to have modified the injunction in one particular at least. That subject need not necessarily be considered here, though it is deemed proper to indicate the views of the court in aid of further proceedings that may be had.

Respondents' counsel say it is an established principle of equity jurisprudence that the jurisdiction of equity does not extend to barring the privilege of a person to vindicate his legal rights at law. That is a general but by no means universal rule. There are many exceptions to it, sufficient to meet all situations where wrongs cannot be adequately pre-

vented or redressed otherwise than by putting restraint upon the liberty of the person to use legal remedies. The case upon which respondents' counsel chiefly rely (*Third Ave. R. Co. v. New York*, 54 N. Y. 159) amply shows the limitation of the rule. It is there said, in substance, that 'the jurisdiction of a court of equity to prevent by injunction a multiplicity of suits is unquestionable and it may well be exercised for temporary restraint where there are a large number of actions pending, instituted by the same person in different courts to vindicate the same right, so as to prevent the prosecution of all but one of such actions.' Equity jurisprudence goes as far as reason will permit, under the circumstances of each particular case, to discountenance useless litigation and prevent irreparable injury. With that familiar principle in view one need not feel bound in every case to test the right of a person to proceed by injunction, by precedents. If the case falls clearly within the principle, there is no room to doubt the jurisdiction. In the case to which we have referred the opinion closes with language which quite well fits this case except for the scope of the injunction here granted: "The prosecution of all the suits referred to in the complaint at one and the same time would be unnecessarily oppressive by having costs incurred which it is said in the complaint would be 'onerous and oppressive;' and the case is one, under all the facts disclosed, where the interference of a court of equity was properly invoked and exercised."

It is particularly insisted by respondents' counsel that the court should not have restrained the proceedings in the criminal actions. Here again a general principle is invoked,— the rule that equity will not interfere by injunction to prevent the exercise by courts of their criminal jurisdiction, nor to prevent the commission of crime,— without recognizing the exceptions, which are as well defined in the books as the rule itself, that such rule does not apply

where the ends of justice require restraint upon the liberty of a person to commit minor offenses or to institute criminal prosecutions therefor as a means of invading and violating property or civil rights, thereby preventing the legitimate enjoyment thereof. High, Injunctions, § 68; *Atlanta v. Gate City Gas L. Co.* 71 Ga. 106; *O'Brien v. Harris*, 105 Ga. 732; *Casey v. Cincinnati T. Union*, 45 Fed. Rep. 135; *Cœur d'Alene C. & M. Co. v. Miners' Union*, 51 Fed. Rep. 260; *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 Fed. Rep. 730, 746. An examination of the cases cited will demonstrate that the jurisdiction of equity is frequently and successfully invoked to prevent misdemeanors and prosecution for such offenses where the commission and the prosecution thereof is resorted to or threatened as a means of preventing the enjoyment of property rights and there is no other way of adequately remedying the mischief, either by way of preventing the damage that might otherwise result or repairing such damage thereafter. We conclude this branch of the case by saying that if the trial court had relieved *Bradley* from incapacity to proceed in the first civil case for damages, leaving full opportunity to test the right of the controversy in that one case, he would have had no good ground for complaint. The other cases did not serve any useful purpose. Their commencement was ill-advised and useless. Assuming that the parties were acting in good faith, one case was as good as a multitude for all practical purposes.

It is insisted on behalf of respondent *Nethercut* that his position is different from that of his associates, because he has never refused to pay the extra fare upon plaintiff's cars; that he has only insisted that the collection of it is illegal; that the only active connection he has had with the controversy involved in this suit, as shown by the record, is to insist publicly and privately that plaintiff is in the wrong. If, when *Nethercut* answered the complaint, he had stood

upon his individual record in the matter instead of joining actively with the other defendants in their defense, there would be strong and perhaps unanswerable reasons for saying that as to him the dissolution of the injunction was proper. When we take his answer as a whole, it clearly appears that he thereby chose to take an active part in the legal contest to maintain the right of his associates to do the things complained of. That being the case, since a continuance of the injunction as to him cannot in any way injure him materially, we see no very good reason why he should be excepted from the restraint put upon his associates till the final termination of the cause. If he shall not be held by the final decree, he will find ample protection for his damages in the bond given for that purpose and the costs which he will recover.

By the Court.—The orders appealed from are reversed.

BARDEEN, J., took no part.

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HART and others, Respondents, vs. FRATERNAL ALLIANCE, Appellant.

December 7, 1900 — January 8, 1901.

Life insurance: Suicide: Evidence: Admissions in proofs of death: Court and jury: Reasonable stipulations as to proofs of death: Waiver by denial of liability.

1. In an action upon a certificate of insurance the proofs of death furnished by the beneficiaries to the insurer and showing that deceased came to his death by suicide, were competent *prima facie* evidence of that fact against the beneficiaries.
2. Upon the evidence in this case, including an admission of suicide in the proofs of death, it is *held* that the fact of suicide was conclusively proven and that a verdict to the contrary was wholly unsupported.

3. By the terms of a certificate of insurance the insurer was not liable in case of suicide, except for the amount of premiums paid by the insured; and it was stipulated that in case of an inquest a certified copy of the evidence, verdict, and proceedings therein should be attached to the proofs of death. *Held*, that such stipulation was reasonable, and compliance therewith was necessary to give a right of recovery.
4. A denial of liability by an insurer, made after the expiration of the time for furnishing proofs of death and when it could not in any way have influenced the action of the beneficiaries with respect to such proofs, does not operate as a waiver of defects in the proofs furnished.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

Action on a benefit certificate of $2,000, issued by the defendant on the life of Richard H. Hart. The beneficiary being dead, the action is brought by children of deceased. The certificate was issued upon condition that the member should comply with all existing laws, rules, and regulations of the order, and such as might, from time to time thereafter, be adopted, and which should be and form a part of the contract. At the time of Mr. Hart's death, Law 24 provided, among other things, as follows: "In case of death by suicide, whether sane or insane, except where insanity of such member shall have been prior thereto judicially determined, the entire and only liability under the contract shall be the amount of premiums paid thereon to the association by the insured, as shown by the records of the association, with interest thereon at six per cent. per annum, and the same shall be received by the beneficiary in full settlement of his policy." Law 29 required that satisfactory proofs of all claims should be filed within ninety days from date of death; that true answers should be made to all questions asked relating to the health and death of insured; and that, in case of an inquest, there should be attached to, and made a part of, such proofs, "certified copies of the evidence, ver-

dict, and proceedings on such inquest." The answer alleged noncompliance with Law 29, and also that Hart died from suicide.

Upon the trial the plaintiffs offered in evidence the proofs of death, which included the instructions of the supreme lodge; the report of the committee of the subordinate lodge of which deceased was a member; a recommendation by the lodge of payment of the claim; a certificate of the coroner that he had investigated the cause of death and that the cause of death was suicide by carbolic acid; a certificate of a friend, who also stated that the cause of death was suicide; and a certificate of the undertaker of the interment. The death occurred January 9, 1899. A demand for payment of the claim was made March 22d, and on April 28th the defendant, by its attorney, denied liability on the ground that Hart died by his own hand, and offered to pay the amount of premiums paid by deceased, with interest. Other formal proofs were made, and plaintiffs rested their case.

A motion for a nonsuit was overruled, and duly excepted to. The defendant attempted to prove that objections to proofs of death were made on the ground that they were not accompanied by a certified copy of the testimony taken by the coroner, but, under objection, the court ruled out the testimony. The defendant showed by the coroner that several witnesses were sworn on the inquest, and by the doctors who made the examination of the body that death resulted from carbolic acid poisoning.

A motion for direction of a verdict for the defendant was denied, and the court instructed the jury that the failure to attach copies of the testimony taken at the inquest was not a material omission; that the statement in the proofs of death that Hart's death was from suicide "raises a presumption against the beneficiaries;" and that the burden of proof was on them "to establish to a reasonable certainty that the deceased came to his death from some other cause than sui-

cide." A verdict was found for plaintiffs for the amount of the certificate, less the amount of premiums paid by deceased, which had been paid into court by defendant. A motion for a new trial was denied, and from a judgment for plaintiffs the defendant brings this appeal.

For the appellant there was a brief by *Quarles, Spence & Quarles*, and oral argument by *George Lines*. They argued, among other things, that the statements contained in the proofs of death were competent evidence as to the cause of death. *Hanna v. Conn. M. L. Ins. Co.* 150 N. Y. 526; *Buffalo L., T. & D. S. Co. v. Knights Templar & M. M. A. Asso.* 126 N. Y. 450; *Insurance Co. v. Newton*, 22 Wall. 32; *Insurance Co. v. Higginbotham*, 95 U. S. 380; *Keels v. Mut. R. F. L. Asso.* 29 Fed. Rep. 198; *Bachmeyer v. Mut. R. F. L. Asso.* 82 Wis. 255; *S. C.* 87 Wis. 325; *John Hancock M. L. Ins. Co. v. Dick*, 44 L. R. A. 846, note.

M. N. Lando, for the respondents, contended, *inter alia*, that the proofs of death were admissible only to show compliance with the condition of the policy, but not to show that death was by self-destruction. *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189; *Home B. Asso. v. Sargent*, 142 U. S. 691. It was incumbent upon defendant to prove suicide. *Mut. B. L. Ins. Co. v. Daviess' Ex'r*, 87 Ky. 541; *Mut. L. Ins. Co. v. Wiswell*, 56 Kan. 765; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189; *Fisher v. Fidelity M. L. Asso.* 188 Pa. St. 1.

BARDEEN, J. The certificate in suit provided that in case of suicide the only liability under the contract should be the amount of the premiums paid by the insured, with six per cent. interest. The proofs of death showed that deceased came to his death by suicide. The doctors who made the *post mortem* examination testified that they found a quantity of carbolic acid in the stomach of deceased; that the entire lining of the stomach was "eaten off and burned up;"

and that it was congested and swollen. Their conclusion was that death was caused by carbolic acid poisoning. Concerning this fact the evidence does not admit of reasonable controversy. As already noted, the proofs of death furnished by plaintiffs showed that the death of the insured was from suicide. Such proofs, when offered by defendant, were admissible as tending to prove the fact of suicide. They operated as admissions against interest, and, while not conclusive, were competent *prima facie* evidence against the beneficiaries. *Bachmeyer v. Mut. R. F. L. Asso.* 82 Wis. 255; *S. C.* 87 Wis. 325; *Hanna v. Conn. M. L. Ins. Co.* 150 N. Y. 526; *Insurance Co. v. Newton*, 22 Wall. 32. These admissions, taken in connection with the testimony of the doctors as to the cause of death, absolutely barred a recovery in this case, unless it was shown that such poison was not taken with suicidal intent. No such showing was made. What little evidence there is seems to point to the fact of suicide. On the day of his death deceased went to his business as usual about 6:30 o'clock in the morning. He returned home for breakfast, and again went to his shop. Between 9 and 10 o'clock he returned home, and complained of a headache. He went upstairs, and lay down on the bed. He ate no dinner. About 3 o'clock he went downstairs to the basement, to the room where the bottle of carbolic acid was kept, stayed a few minutes, and again went upstairs. About a half hour afterwards he was discovered unconscious, and soon died. He made no outcry The bottle of acid was but partly full. The odor of the acid was discovered in the room. The evidence of the doctors showed that no one could take a sufficient quantity of carbolic acid to cause death without knowing it; that a person taking it could move about,— make an outcry or noise to attract attention. The acid was taken either intentionally or by mistake. As soon as it passed into his mouth the deceased must have felt the effect of the burning liquid. The instinct of self-preservation would have at

once prompted some outcry or noise to attract attention if it had been taken by mistake. Nothing of this kind occurred. The fact that no noise or outcry was made is strong proof against the theory of mistake or accident. These facts, coupled with the admission of suicide in the proofs of death, were so conclusive that the court should have granted defendant's motion for direction of a verdict. The verdict rendered was founded on mere speculation, and is against every reasonable probability in the case.

There is also another error committed by the court fatal to the judgment. Under the certificate, the insured and his beneficiaries were bound by the laws of the association in force at the time of his death. One of the regulations was that, in case of an inquest, a certified copy of the evidence, verdict, and proceedings therein should be attached to the proofs of death. No attempt was made to comply with this rule any further than to attach thereto a certificate of the coroner that he had investigated the cause of death. The trial court held and instructed the jury that such failure was immaterial and was no defense to the action. It was competent for the parties to stipulate such reasonable conditions as they pleased in regard to proofs of death. Generally, such conditions must be complied with, unless performance has been waived or the insurer is, by some act of its own, estopped from setting up the condition. Bacon, Ben. Soc. § 403. The following cases in this state illustrate the necessity of strict compliance with reasonable stipulations kindred to the one under consideration: *Bonner v. Home Ins. Co.* 13 Wis. 677; *Blakeley v. Phœnix Ins. Co.* 20 Wis. 205; *Cayon v. Dwelling House Ins. Co.* 68 Wis. 510; *Oshkosh M. Works v. Manchester F. A. Co.* 92 Wis. 510. No attempt is made by plaintiffs' counsel to justify the ruling of the trial court that such stipulation was immaterial. From our point of view this would be a difficult undertaking. The stipulation was certainly reasonable. Its purpose is evident. In case

of suicide the company was not liable except for premiums as before stated. The provision requiring the proceedings on the inquest to be certified was substantial and important, and designed to enable the insurer to investigate the cause of death and to ascertain whether it occurred under circumstances that would free it from liability.

Plaintiffs' counsel suggest that this requirement has been waived by the defendant. This contention is based upon the fact that, under date of March 22d, he made a written demand for payment of the loss. To this Mr. Charles Quarles, as attorney for defendant, made answer, April 28th, denying liability on the ground of suicide. Hart's death occurred January 9th, and proofs were required within ninety days. Mr. Quarles's letter was written some days after the expiration of the time for filing proofs. There can be no doubt about the general proposition that a denial of liability by an insurance company may operate as a waiver of defects in proofs of loss or excuse the failure to furnish any proofs whatever. But, to have that effect, the current of authority is that there must be shown some act or declaration by the company during the currency of the time within which the beneficiaries were required to act, from which they might reasonably infer that the insurer did not intend to rely upon failure to so furnish proper proofs. May, Ins. § 505; *Killips v. Putnam F. Ins. Co.* 28 Wis. 472; *Engebretson v. Hekla F. Ins. Co.* 58 Wis. 301; *Ermentrout v. Girard F. & M. Ins. Co.* 63 Minn. 305; *Westchester F. Ins. Co. v. Coverdale*, 9 Kan. App. 651. This doctrine of waiver is only another name for the doctrine of estoppel. It cannot be invoked unless the conduct of the company has been such as to induce action or to prevent action in reliance upon it, where it would operate as a fraud upon the other party if it should be allowed to disavow its conduct and enforce the conditions. *Insurance Co. v. Wolff*, 95 U. S. 326. The denial of liability in this case on the ground stated was made after the plaint-

iffs were in default, and could not in any way have influenced their action with respect to furnishing proofs of death. *Engebretson v. Hekla F. Ins. Co.* 58 Wis. 301. The evidence fails to show any proper ground of waiver. The failure to comply with so important a requirement not being excused, it afforded an additional ground why the verdict and judgment in this case should not stand.

By the Court.— The judgment is reversed, and the cause is remanded for a new trial.

KOEBER, Respondent, vs. SOMERS, Appellant.

December 8, 1900 — January 8, 1901.

Leases: Implied covenants: Attorney and client: Privileged communications.

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1. Under secs. 2204, 2242, Stats. 1898, there are no implied covenants in a lease for a term exceeding three years. A statement to the contrary in *Shaft v. Carey*, 107 Wis. 273, not necessary to the decision of that case, is withdrawn.
2. An attorney who has received from his client authority as an agent to enter into a contract with a third person and has acted thereon may testify to the giving of such authority if it comes in question. Sec. 4076, Stats. 1898, has no application to such a case.
3. A party is not protected by any privilege from testifying as to whether he received from his attorneys moneys paid to them by the adverse party in accordance with a settlement of the demand in suit made by said attorneys with such adverse party.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

On August 25, 1893, defendant leased to plaintiff for five years, at the rate of $83.33 per month, "the certain two-story frame building known and numbered 264 West Water street, and the real estate upon which the same is situated." The building was a somewhat dilapidated frame building of ad-

vanced age, consisting of a store and an imperfect second story, twenty feet front. At the time of the leasing an equally dilapidated frame building belonging to one Lange stood about six feet south of the leased building, and between the two was an old stairway, used in common to reach the second floor of both buildings. These steps were supported on one side by cleats nailed to the leased building and on the other by uprights a foot or two from Lange's building. At the top was a platform extending from building to building, and giving access to both. In May, 1895, Lange proceeded to tear down his building, and to excavate for the erection of a new one up to his line, which was about one foot south of the leased building, thus necessitating the removal of the stairs. Thereafter plaintiff continued to occupy the ground floor as a store, making no use of the second story, and paid his rent without objection or protest up to the end of the lease. He brings this suit alleging the removal of the stairs by other parties, his resulting deprivation of the use of the upper story, and damage in the sum of $1,000. The jury allowed him $8.33 per month for the remainder of his leasehold term,— $333.20.

It appeared that plaintiff, in January, 1896, caused suit to be commenced by his then attorneys, Felker, Goldberg & Felker, against this defendant, for damages resulting from the partial eviction, predicated upon breach of an implied covenant for quiet enjoyment. Defendant offered in evidence a written acknowledgment from Felker, Goldberg & Felker of settlement of said action for the sum of $25, paid December 10, 1896. In order to qualify it for admission, defendant offered Mr. Felker as a witness, and having by him established the fact that he was attorney, and that the written agreement was made and delivered, and the amount therein specified paid, asked him whether or not plaintiff authorized the making of that settlement. He replied that he could not give that information except as the result of

communications between plaintiff and himself in the capacity of client and attorney, and submitted to the court whether he should state it. The question being objected to by plaintiff, the court ruled that it called for privileged communications, and sustained the objection. Plaintiff was asked if he received the $25 so paid Felker, Goldberg & Felker, or any part of it, and objection thereto was sustained. The evidence was conflicting as to whether plaintiff consented to the removal of the stairs.

Upon the verdict, judgment was rendered for plaintiff, from which defendant appeals.

Jared Thompson, Jr., for the appellant, to the point that the questions asked of plaintiff's former attorneys with reference to their authority to settle the former action were not within the privilege secured by the common law and the statute, especially after the execution of the written settlement, cited *Thayer v. McEwen*, 4 Ill. App. 416, 418, 419; *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604; *Henderson v. Terry*, 62 Tex. 281; *Burnside v. Terry*, 51 Ga. 186; *Wyland v. Griffith*, 96 Iowa, 24; *Todd v. Munson*, 53 Conn. 579; *Moffatt v. Hardin*, 22 S. C. 9; *House v. House*, 61 Mich. 69; *Ripon v. Davies*, 2 Nev. & M. 310; 19 Am. & Eng. Ency. of Law (1st ed.), 136–141; *Day v. Moore*, 13 Gray, 522; *Gower v. Emery*, 18 Me. 79; *Kelly v. Wright*, 65 Wis. 236, 238, 239; *Hanlon v. Doherty*, 109 Ind. 37; Weeks, Att'ys at Law (2d ed.), 323, 326, 338, 364; Mechem, Agency, §§ 881, 882; *Murphy v. Waterhouse*, 113 Cal. 467; *Rosseau v. Bleau*, 131 N. Y. 177.

For the respondent there was a brief by *Turner, Pease & Turner*, and oral argument by *W. J. Turner*. They contended, *inter alia*, that plaintiff's former attorneys had no right, without his express consent, to compromise the claim for a small portion thereof. Weeks, Att'ys at Law, 380–385, 458, 471; *Kelly v. Wright*, 65 Wis. 236; *Hooker v. Brandon*, 75 Wis. 8. The exclusion of their testimony as to their

authority was proper. *Dudley v. Beck*, 3 Wis. 274; *Getzlaff v. Seliger*, 43 Wis. 297; *Bacon v. Frisbie*, 80 N. Y. 394.

DODGE, J. Two interesting and important questions are presented which go to the ultimate question of liability and obviate necessity for considering other assignments of error which reach only to the correctness of the trial and procedure. Those questions are: First, the existence of any covenant by defendant for plaintiff's quiet enjoyment of the demised premises; second, the right of defendant to prove, by testimony of plaintiff's former attorney, the giving to him of authority to make a settlement of plaintiff's demand, which he did in fact make.

1. At common law, as is elementary, from the ordinary words of grant or demise in an instrument relating to real estate were implied certain covenants; among others, that the grantor had the right to convey, and that he would protect the grantee from lawful interference by others in enjoying the demised premises. This is called a covenant for quiet enjoyment. *Eldred v. Leahy*, 31 Wis. 546. Our statute, however (sec. 2204, Stats. 1898), reversed the rule of the common law, and provided that "no covenant shall be implied in any conveyance of real estate." This would seem final but for certain decisions in New York, whence we took the words above quoted, and but for the declaration very recently made by this court in *Shaft v. Carey*, 107 Wis. 273, that: "The statute (sec. 2204, Stats. 1898) to the effect that no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not, does not apply to leasehold estates. This is the rule now established in New York, from which our statute was taken, although a different conclusion was at first arrived at. *New York v. Mabie*, 13 N. Y. 151."

On examining the authority there cited, we find it to relate to a lease for only three years, but to adopt the reason-

ing of Chancellor WALWORTH in *Tone v. Brace*, 11 Paige, 566, which related to a lease for five years. In those cases it was held that the term "conveyance" did not include leases for years, repudiating the reasoning of an earlier case, where it was held that a lease for five years was a "conveyance of real estate," because another statute of that state (sec. 36, ch. 3, p. 762, 1 R. S. N. Y. 1829) provided that the term "real estate" should include all interests in land except a leasehold for not exceeding three years. The subject has received no elaboration or discussion in later New York decisions. In some cases *New York v. Mabie* has been cited merely to support the proposition that implied covenants exist in leases for less than three years. *Vernam v. Smith*, 15 N. Y. 327; *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293; *Vann v. Rouse*, 94 N. Y. 401. In others it is assumed that no lease for years, though exceeding three, is within the statute excluding such covenants. *Graves v. Berdan*, 26 N. Y. 498; *Mack v. Patchin*, 42 N. Y. 167; GROVER, J., in *Burr v. Stenton*, 43 N. Y. 462, 464. While in still others, including the latest utterance we have found on the subject, the statute is, without argument, assumed to exclude implied covenants from leases longer than three years. CHURCH, J., in *Burr v. Stenton, supra; Coffin v. Brooklyn*, 116 N. Y. 159.

Thus it is by no means clear that *Tone v. Brace* and *New York v. Mabie* correctly declare the law, even of New York, as to their statute. Whether they do or not, however, the views expressed in them are in direct conflict with sec. 2242 of our statutes, which clearly includes within the term "conveyance" all leases for more than three years, and has been so treated whenever referred to. *Eldred v. Leahy*, 31 Wis. 546; *Topping v. Parish*, 96 Wis. 378, 382. It provides: "The term 'conveyance,' as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mort-

gaged or assigned or by which the title to any real estate may be affected in law or equity, except wills and leases for a term not exceeding three years." New York had no such section in the chapter containing the original of our sec. 2204 (sec. 140, ch. 1, p. 738, 1 R. S. N. Y. 1829). True, there existed a section in the same words, but in another chapter, devoted to the recording of conveyances (sec. 38, ch. 3, p. 762, 1 R. S. N. Y. 1829); but it was never referred to as affecting the interpretation of sec. 140, ch. 1. It is, therefore, apparent that decisions of New York courts are not controlling as to the scope of sec. 2204, so far, at least, as they conflict with the interpretation expressly and without ambiguity given it by the legislature in sec. 2242.

Considering our own statute, then, as an original proposition, there is no ambiguity. The words and the intent of the legislature are clear to the effect that no covenant shall be implied in any conveyance of real estate, and that a lease for more than three years is such a conveyance. This court cannot properly change or ignore that legislation. Our declaration in *Shaft v. Carey*, 107 Wis. 273, above quoted, if adhered to, would have that effect, and we hasten to avail ourselves of this early opportunity to withdraw it; the more readily because in the few months since it was uttered it cannot have become so established as a rule of property as to affect in very considerable degree vested rights; certainly not the rights of the parties now under consideration, for they had become fully settled — nay, had been tried in the superior court — before the decision of *Shaft v. Carey*. The result reached in that case did not necessarily depend on the rule of law so announced, for that was not an action to recover for breach of any implied covenant, but was a suit to enjoin one holding under and in the right of the lessor from doing acts invasive of rights granted by the lease itself. The duty of the lessor to refrain from voluntarily and unnecessarily interfering with

the possession he himself has granted stands on very different ground from his liability to respond in damages when that possession is disturbed by another under a superior title. The rights of the lessee were not predicated upon implied covenant, nor did the briefs of counsel discuss the subject, nor did the court have its attention called to sec. 2242 as affecting sec. 2204.

We hold, therefore, that in the lease from defendant to plaintiff there was no implied covenant to defend the latter from interruption of his use of a portion of the premises by the acts of Lange upon his adjoining premises, under his superior title, and that plaintiff cannot maintain his action for damages founded upon breach of such covenant. The refusal of instructions requested by defendant substantially to this effect was error necessitating reversal.

2. The proposition advanced by respondent and adopted by the trial court, that one, after fully authorizing his attorney, as his agent, to enter into contract with a third party, and after such authority has been executed and relied on, may effectively nullify his own and his duly authorized agent's act by closing the attorney's mouth as to the giving of such authority, is most startling. A perilous facility of fraud and wrong, both upon the attorney and the third party, would result. The attorney who, on his client's authority, contracts in his behalf, pledges his reputation and integrity that he binds his client. The third party may well rely on the assurance of a reputable lawyer that he has authority in fact, though such assurance be given only by implication from the doing of the act itself. It is with gratification, therefore, that we find overwhelming weight of authority against the position assumed by the court below, both in states where the privilege protecting communications with attorneys is still regulated by the common law and in those where it is controlled by statute, as in Wisconsin. A few of the more direct decisions are the following: *Burnside v. Terry*, 51 Ga. 186; *Rochester Bank v. Suydam*,

5 How. Pr. 254; *Bartlett v. Bunn*, 56 Hun, 507, 509; *Mulford v. Muller*, 3 Abb. Dec. 330; *Hampton v. Boylan*, 46 Hun, 151; *Rosseau v. Bleau*, 131 N. Y. 177, 183; *Nave v. Baird*, 12 Ind. 318; *Mitchell v. Bromberger*, 2 Nev. 345; *Waldo v. Beckwith*, 1 N. M. 182; *Hager v. Shindler*, 29 Cal. 63; *Jeanes v. Fridenberg*, 3 Pa. Law J. 65, 71; *Henderson v. Terry*, 62 Tex. 281; *Gower v. Emery*, 18 Me. 79; *Snow v. Gould*, 74 Me. 540; *Day v. Moore*, 13 Gray, 522; *Dudley v. Beck*, 3 Wis. 274; *DeWitt v. Perkins*, 22 Wis. 473; *C. Aultman & Co. v. Ritter*, 81 Wis. 395; Weeks, Att'ys at Law, §§ 151, 152; Greenl. Ev. §§ 245, 246.

Our statute (sec. 4076) on this subject is adopted from New York, and has been declared to be but re-enactment of the common law. *Hurlburt v. Hurlburt*, 128 N. Y. 420, 424; *State ex rel. Hardy v. Gleason*, 19 Oreg. 159, 162. It provides: "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment."

The rule of the common law and of this statute within its proper limits is most salutary. It is essential to the ends of justice that clients should be safe in confiding to their counsel the most secret facts, and to receive advice and advocacy in the light thereof without peril of publicity. Disclosures made to this end should be as secret and inviolable as if the facts had remained in the knowledge of the client alone. *Bruley v. Garvin*, 105 Wis. 625. But there are necessary limits to the broad rule that all communications between him who is client and him who is attorney are thus privileged. One limitation bearing upon the question in hand grows out of the words of the statute itself. To be privileged, the communications to the attorney must have been in the course of his professional employment. The field of services performed by men who are attorneys at law and of the transactions between them and those whom they serve

is continually extending. Many things are done by them in other capacities than as attorneys at law. They may be constituted agents or trustees, mediums of transfer of title, or they may enter into various contracts with their clients upon the validity of which their own rights or rights of others may depend, and where such validity can be proved only by testimony of the attorney and client. A multitude of such transactions which might as well be had by the client with one not an attorney at law are held not to be within the professional employment.

One of the earliest cases recognizing this limitation is *Jeanes v. Fridenberg*, 3 Pa. Law J. 65, where the court, by SHARSWOOD, J., after speaking of certain limitations where the relation was clearly professional, said: "These are all cases in which the attorney is but a witness, but there is a class which stands upon higher and still clearer and more unequivocal ground, where the line is distinctly and broadly marked; that is, where the attorney is himself a party to the transaction or agreement which he is called upon to disclose. If the privilege were suffered to be applied to such cases, a wide door would be opened for the successful perpetration of fraud and crime. Attorneys would be selected as the agents or trustees wherever a cover of darkness would be needed, and, though but few might be found base enough to prostitute their high and honorable profession, yet the character of the whole bar would be injured and degraded by the conduct of those few." In that case the attorney was held obliged to testify to the receipt from his client of moneys in trust to pay to certain creditors. In *Rochester Bank v. Suydam*, 5 How. Pr. 254, the attorney, having indorsed commercial paper of his client and stated at the time of his indorsement that he held in his possession certain property as security, was held obliged to disclose the dealings with his client as to the transfer to him of such property, and what he had done with it, on the ground, as

stated by the court, that such communications would not seem to have been "communicated to him with a particular view to any legal business to be done by him either as attorney or counsel, but to have come to his knowledge from time to time during employment, sometimes as attorney and constantly as agent, and to have related as much to his business in the latter capacity as in the former." In *Hager v. Shindler*, 29 Cal. 63, where the attorney received a voluntary deed from his client in order to borrow money on the property, and then made a voluntary deed to another at the direction of his client, he was required to testify thereto partly on the ground above suggested,— that the transactions were extra-professional and might as well have been with a layman as with the attorney. This is the principle at the foundation of *Dudley v. Beck*, 3 Wis. 274, where the inquiry was as to the agreement between the client and his attorney as to payments of commissions, etc., as affecting the question of usury, and the attorney was required to testify. The court said: "If the mortgagee made an agreement like that mentioned in the interrogatory, it cannot, with any propriety, be claimed that it was the result of the employment of Mr. Case as his attorney. Nor can it be contended that the acts of Mr. Case which were sought to be proved resulted from such employment. . . . It was an act done by the attorney and client in pursuance of an agreement entered into between them, and not a communication from the latter to the former."

In the light of this principle and these holdings it would seem that the transaction as to which Mr. Felker was interrogated fell clearly outside of a proper limit of communications to the attorney *in the course of his professional employment.* An instruction to one, though an attorney, to perform an act as agent, is a contract. The very fact that, as shown by authorities cited by respondent, such authority cannot be presumed from the mere retainer as an attorney

at law, certainly tends to the conclusion that it was extra-professional; and, since it requires proof of authority, the attorney must, of necessity, be at liberty and be required to testify as to the giving of such authority. The purpose of the privilege and of the limitation thereon will be a sufficient guide to trial courts to prevent the invasion of either. Some other rules of examination of witnesses may well yield to those purposes. It is not improbable — nay, more than probable — that in the same conversation in which authority is given to the attorney to act for his client as an agent there will be disclosure of facts and circumstances and advice and counsel which should be held secret. An intelligent appreciation of the reasons involved, however, will enable courts to control the examination so that, while the proper fact of the granting of authority or of the making of a contract may be disclosed by the attorney, other communications, confidential and professional in their character, will be withheld. See *Chirac v. Reinicker*, 11 Wheat. 280, 294; *Dudley v. Beck*, 3 Wis. 284.

Another limitation upon the privilege of secrecy in communications between attorney and client arises from the fact that such privilege is personal, and may be waived either by express words or by conduct. *McMasters v. Scriven*, 85 Wis. 162, 167. By a great number of authorities, only a few of which are cited above, it has been held that no privilege of secrecy exists over communications which the attorney, for his own protection or the protection of those with whom he deals, needs to divulge, or which were made to him for the express purpose of being communicated to another or of being made public, for the reason that from the very nature of the communications and the purpose with which they are made the conclusion is irresistible that the client intended to authorize the attorney to communicate them, and waived his privilege to have them preserved in secrecy.

Thus, in *Mitchell v. Bromberger*, 2 Nev. 345, in a suit by the attorney for fees, where the defense was inefficiency of service, he was permitted to show fully not only directions given, but facts communicated, to him by his client; the court saying· "It would be manifest injustice to allow the client to take advantage of the privilege to the prejudice of his attorney, or that it should be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights. It is, therefore, held that in such cases he is exempted from the obligation of secrecy. . . . We think it safe to say that whenever in a suit between the attorney and client the disclosure of privileged communications becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law imposes upon him." In *Nave v. Beard*, 12 Ind. 318, misconduct of the attorney was set up by way of counterclaim to a note given for fees. Communications and instructions to the attorney were held not privileged. In *Rochester Bank v. Suydam*, 5 How. Pr. 254, already described, the court said: "Where the attorney or counsel has an interest in the facts communicated to him, and when his disclosure becomes necessary to protect his own personal rights, he must, of necessity and reason, be exempted from the obligation of secrecy. . . His clients, by giving him a direct interest in the facts from time to time communicated to him, and by dealing with him upon the footing of those facts, have, as it strikes me, voluntarily waived their right to concealment between themselves and the attorney." In that case disclosure was allowed in a suit by one who had dealt with the attorney, because his rights depended on those of the attorney.

In *Burnside v. Terry*, 51 Ga. 186, where the agreement accompanying a conveyance was made through the medium of Terry's attorney, and he was called to prove his authority, the court said: "If the fact of the attorney's having this au-

thority was communicated by him to Burnside, and Burnside, through him, made the contract, and acted on it, and it was accordingly carried out, it could not be that the giving of such authority was such a communication by client to attorney that it is protected by law against being proven by the attorney. If a party holds out his attorney as one having authority from him to make a special contract respecting pending litigation, and the attorney acts upon it, treats with his antagonist, and thereby secures important rights to his client, he cannot deny the right of the attorney or of the opposite party to prove by the attorney the contract and the authority to make it." In *Henderson v. Terry*, 62 Tex. 281, where propositions were made by the adverse party to the attorney, by him communicated to his client, and instructions given him with reference to accepting the same, the court held that he should testify; saying: "Obviously Terry intended that his attorney should make known to Henderson his reply to the proposition; hence it will be seen that it was not a proposition made to the attorney for the purpose of securing from him professional aid or advice, but was made by Terry with the intention that it should be communicated to the other party. Clearly, the court erred in excluding the evidence." In *Waldo v. Beckwith*, 1 N. M. 182, where the question of plaintiff's partnership was material, defendant called a former attorney to testify that instructions had been given him to commence a previous suit on behalf of the plaintiff and two others as copartners. The court held the communication not privileged, saying: "The attorney was informed of the names of the members of the firm for what purpose? For the express purpose of being published. He was to institute suits for them, and the publication, in legal form, was to enable them to prosecute them. . . . It was made known to the attorney, and at the same time in the same acts to third persons, courts, and the public. It was not, in its nature, private, and could

in no sense be termed the subject of a confidential communication."

In *Bartlett v. Bunn*, 56 Hun, 507, where the defense was that money had been paid out by defendant on the direction of plaintiff, given through the medium of plaintiff's attorney, the attorney was required to give evidence of the communication of such directions to him by his client. The court said, after stating the general rule as to privileged communications: "But this prohibition may be waived by the client, and, when the communication is made for the purpose of its publication or communication to another, it necessarily loses its privileged character. It follows, therefore, that when, from the very nature of the communication, it was designed by the author for another, and to be communicated to such other, it loses its character as privileged." In *Rosseau v. Bleau*, 131 N. Y. 177, where it was claimed that a deed had been delivered by the client to his attorney for a third person, the attorney was held competent and required to testify to the instructions given him by his client. The court said: "Such communication from client to attorney is not within the prohibition of the section of the Code, and the attorney was always competent to prove it, as from its very nature it was not made in professional confidence, nor intended to be confidential, but, on the contrary, imparted to another. It has never been held that a verbal message communicated from client to attorney to be delivered to a third person cannot be proved in behalf of the person to whom the message was sent by the testimony of the attorney. . . . When the deceased commissioned the witness to deliver the deed to the grantee named therein, she necessarily waived all the objection that she might otherwise make to proof of that fact by the attorney." It is upon this same principle of waiver, inferred from the purpose of publication or communication to another, that attorneys who, at the request of grantors or testators, become subscribing

witnesses, are allowed and required to testify to the transaction. *Matter of Coleman's Will*, 111 N. Y. 220; *McMasters v. Scriven*, 85 Wis. 162.

The transaction here between Felker and plaintiff, if it took place, would fall obviously within all of the reasons of the cases above quoted to justify inference of an implied authority to him to testify with reference thereto, and waiver of any privilege of secrecy. The attorney's own interests are vitally affected, for, if he may not prove that he had authority to settle the claim of plaintiff against the defendant, and to receive from the latter money in consideration thereof, he is placed in an attitude of fraud, and his standing and repute in the business world must suffer. Again, the irresistible effect of the granting of authority to one's attorney to deal with a third person is to authorize that attorney to communicate the fact, whether he does it by words or solely by executing the authority. Indeed, he cannot perform the service delegated to him without so communicating. The rule, therefore, outlined by the above-cited authorities, that an attorney is not restrained by any duty of confidence to his client to withhold the fact that he has received from that client authority as an agent to deal with a third person, certainly after the authority has been acted on, is founded upon the soundest reason, and is absolutely necessary to prevent the privilege of secrecy from being made an implement of injustice and fraud. The ruling of the court that Mr. Felker could not testify as to whether authority was given him by his client to make the written settlement which he did make was error.

Even more obviously erroneous was the ruling that the plaintiff was protected by the same privilege from answering the question whether he received from Felker, Goldberg & Felker the money paid them by defendant upon this settlement. *State ex rel. Hardy v. Gleason*, 19 Oreg. 159, 162; *Williams Bros. v. Young*, 46 Iowa, 140, 143; *C. Au tman & Co. v. Ritter*, 81 Wis. 395.

For these errors the judgment before us must be reversed. Other assignments need not be discussed, as they present questions not likely to arise again in the case in view of the rules of law already decided.

By the Court.— Judgment reversed, and cause remanded for a new trial.

BARDEEN, J., took no part.

LIPPERT, Respondent, vs. SAGINAW MILLING COMPANY, Appellant.

December 8, 1900 — January 8, 1901.

Written contract of sale: Place of delivery: Ambiguity: Evidence: Damages for delay.

1. A written contract for the sale of beans "delivered East St. Louis" is plain and unambiguous, and parol evidence as to the meaning of the word "delivered" is not admissible.
2. Defendant sold to plaintiff a car load of beans, to be shipped immediately and delivered at East St. Louis, and on the same day plaintiff contracted to sell them to another person at said place. Three weeks later plaintiff's vendee canceled his contract because of defendant's delay in delivering the beans, and defendant afterwards admitted its responsibility for such delay, but declined to take the beans back or take charge of their sale or advise what should be done with them. Plaintiff afterwards sold them at a loss. *Held*, that defendant was liable for the damages caused by the unnecessary delay in delivering the beans.
3. The recoverable damages in such a case do not include traveling expenses of plaintiff, lawyer's fees, or money paid for photographs, telegrams, exchange, etc., but are limited to such as are reasonably considered to have been in contemplation of the parties, at the time of making the contract, as the probable result of its breach.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Roemer & Aarons*, and oral argument by *C. L. Aarons*. They contended, *inter alia*, that it was error to refuse to allow defendant to show that the word "delivered," as used in the correspondence of the parties, had a peculiar significance among bean dealers, and that it signified that the price included the freight to the place named and did not refer to the place where title should pass. *McLaughlin v. Marston*, 78 Wis. 670; 2 Jones, Ev. §§ 461, 462; *Ganson v. Madigan*, 15 Wis. 144, 153; *Scott v. Neeves*, 77 Wis. 312; *Janesville C. Mills v. Ford*, 82 Wis. 416; *Becker v. Holm*, 89 Wis. 86; *Gehl v. Milwaukee P. Co.* 105 Wis. 580; *A. J. Neimeyer L. Co. v. B. & M. R. R. Co.* 40 L. R. A. 534, 537; *Tregelles v. Sewell*, 7 Hurl. & N. 574. In the absence of an express agreement to the contrary, delivery by a vendor to a carrier passes the property to the vendee. 21 Am. & Eng. Ency. of Law, 528–530; *Doyle v. Roth Mfg. Co.* 76 Wis. 48, 54; *Ramsey & Gore Mfg. Co. v. Kelsea*, 22 L. R. A. 415, and note. The consignment of the carload of beans to the plaintiff, and his acceptance and indorsement of the bill of lading, certainly passed the property to him. *Doyle v. Roth Mfg. Co.* 76 Wis. 54; *Sarbecker v. State*, 65 Wis. 171; *Swanke v. McCarty*, 81 Wis. 111; Usher, Sales, § 232; Newmark, Sales, § 152; 2 Schouler, Personal Prop. (3d ed.), §§ 264, 273; *Thomas Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291. The terms of the bill of lading complied with plaintiff's directions, and the actual payment by the plaintiff of the draft attached to the bill of lading removes all doubt that the parties intended that the title to the goods should pass to the plaintiff at the time of shipment from Saginaw. *Stock v. Inglis*, 12 Q. B. Div. 564; *Dows v. Nat. Exch. Bank*, 91 U. S. 618. This being the case, the defendant having delivered the goods in accordance with the contract to the carrier at Saginaw, it is not responsible for the delay, if any, in reaching East St. Louis, and instead of

directing a verdict for the plaintiff it should have been directed for the defendant.

For the respondent there was a brief by *McElroy & Eschweiler*, and oral argument by *F. C. Eschweiler*. They argued, among other things, that the title remained in the defendant until East St. Louis was reached. *Hooper v. C. & N. W. R. Co.* 27 Wis. 81, 91. Oral evidence could not be given of the meaning of the word "delivered." *Elofrson v. Lindsay*, 90 Wis. 203; 2 Jones, Ev. § 460.

CASSODAY, C. J. This is an action to recover $310.15, with interest on $246 from August 25, 1897, as damages for failure to ship from Saginaw, Mich., and deliver to East St. Louis, Ill., a car load of beans, at the agreed price of $450.50, according to the contract, whereby the plaintiff lost the sale thereof. The defendant answered by way of admissions, denials, and counter allegations, and also set up two counterclaims, arising out of other transactions, one for $38.60, and the other for $25.86. At the close of the trial the court directed a verdict in favor of the plaintiff upon the defendant's counterclaims, and also upon the cause of action alleged in the complaint, except as to the amount of damages, and the question of the amount of damages was submitted to the jury, and they returned a verdict in favor of the plaintiff, and assessed his damages at $342.13. From the judgment entered thereon for that amount and costs the defendant brings this appeal.

The following facts are admitted or appear from the undisputed evidence, consisting of correspondence between the parties:

During the times mentioned the plaintiff resided at Milwaukee, and was engaged in the business of buying and selling beans and other products. The defendant was and is a corporation existing under the laws of Michigan, and having its principal place of business at the city of Saginaw, in

that state. On October 6, 1896, the plaintiff telegraphed the defendant: "Wire immediately lowest car hand-picked pea-beans, delivered Altona, Pa.; also car delivered East St. Louis." The defendant immediately answered: "Altona, one five; East St. Louis, one three." On the same day the defendant answered by letter containing this statement: "Just received your dispatch, 'Altona, one five; East St. Louis, one three.'" On October 7, 1896, the plaintiff telegraphed the defendant: "Ship immediately choice new hand-picked pea-beans, East St. Louis, your quotation. Make me consignee and consignor. Draw First National, Milwaukee. Bill of lading attached." On the same day the plaintiff wrote the defendant, reciting such telegram and order, adding: "I hereby confirm to have bought of you car same as above, at $1.03 East St. Louis. You will please make me consignee and consignor,— that is, to have it appear as shipped by *H. H. Lippert*, and consigned to *H. H. Lippert*, East St. Louis,— and you can draw with these bills of lading through the First National Bank of Milwaukee, and your drafts will be duly protected. I trust the goods will be first-class stock, and I wish you would ship them immediately." On the same day the defendant wrote the plaintiff: "We have your two wires accepting our offers on beans to Altona, Pa., and East St. Louis, Ill., at $1.05 and $1.03, respectively. We have entered the orders, and will make shipment as early as possible. The shrinkage on beans is unusually large this year, and it will therefore take us a little longer than usual to do the picking. We will be unable to make the shipment inside of a week's time, but we are putting on more pickers daily, and by the first of next week we will be able to turn out a car each day. Thanking you for the orders, and soliciting your further favors, we remain," etc. On the same day the plaintiff sold the same car load of beans to the Meyer-Schmidt Grocer Company, of East St. Louis, and received from that firm on that

same day a dispatch as to that same car load of beans, as follows: "Accept offer. Please ship promptly."

On October 8, 1896, the plaintiff wrote the defendant to "hurry the car along for Altona and East St. Louis." The bill of lading of the car shipped by the defendant to East St. Louis reads: "October 12, 1896. Michigan Central. Received from *H. H. Lippert.* Shipped from Fergus Falls, Michigan, to East St. Louis. Consigned to the order of *Henry H. Lippert*, of East St. Louis, Illinois, 200 bags of beans, *to stop off at Saginaw.* The car is 30,011, and it goes by way of the Clover Leaf Railroad." Indorsed on the back, "*Henry H. Lippert.*" On October 16, 1896, the plaintiff wrote to the defendant in respect to the same car load of beans: "I wish you would hurry the East St. Louis car along now, as the parties have written me for this car." On October 17, 1896, the Meyer-Schmidt Grocer Company wrote the plaintiff in respect to this car: "We are surprised at not receiving invoice and papers from you for the car of beans we purchased from you fully two weeks ago. We are needing the stock, and think the car should have been shipped before this. Please advise us immediately why the stock has not been forwarded, and if the car was shipped to-day please have a tracer started after it." On October 19, 1896, the defendant drew on the plaintiff for the price of this car load of beans this draft: "Pay to the order of G. B. Morley, cashier, $450.50, value received, and charge to account of *Saginaw Milling Company.*" That draft was accepted by the plaintiff October 21, 1896, and paid by him October 22, 1896. On October 28, 1896, the plaintiff received from the Meyer-Schmidt Grocer Company this dispatch, in respect to this same car load of beans: "Car beans not here yet. Start wire tracers for it quick." On October 29, 1896, the plaintiff telegraphed the defendant: "Wire tracer car East St. Louis. Has not arrived yet." On the same day he received

from the Meyer-Schmidt Grocer Company this dispatch: "Account delayed shipment, delayed delivery, improper method shipping, decline take car beans. No notice of arrival." On November 4, 1896, the Meyer-Schmidt Grocer Company wrote to the plaintiff: "We are in receipt of yours of the 3d inst. We have heard nothing from the car of beans, and wired you October 29th to cancel order for the beans. We trust you have canceled this order, as we cannot use them now, under any consideration." On November 5, 1896, the Meyer-Schmidt Grocer Company wrote to the plaintiff: "We have to-day received notification from the railroad company that the 200 bags of beans are in East St. Louis. We wired you, also wrote you two letters, declining to take the car when it arrived, as it is now over a month since we sent you the order."

On November 5, 1896, the plaintiff wrote to the defendant to the effect that he was having more trouble with beans shipped from the defendant's place than with any one else; that either the railroad company was not attending to things properly, or something was wrong elsewhere; that up to that time he would only get an advance of two cents per bushel, and that now the market had declined, and this car of beans was on his hands in another market. The defendant wrote to the plaintiff November 6, 1896: "Yours of the 5th inst. received, and contents fully noted. The delay in arrival of your car certainly warrants you in making complaint. The St. Louis car we find was *delayed* in the railroad yards here *several days* on account of a mistake in the transfer number of the car. In addition to this, we may have been somewhat slow in making the shipment. Of course, the whole matter lies in the fact that beans have declined. In regard to the St. Louis car, get your customer to take the car at a small reduction, and we will pay you what you think right in the matter. Let us hear from you when you have made a settlement."

On November 24, 1896, the plaintiff drew on the defendant for $450.50, and sent the same to the defendant, with the original bill of lading attached. On November 25, 1896, the defendant replied: "Yours of the 24th is received. We do not quite understand your advice in regard to drawing on us for the amount of our invoice of October 29th. We have been willing to meet you half way in regard to this car, and allow you to sell to other parties and draw back on us for the difference. The beans were sold and shipped to you in good faith, and cannot understand how you can positively refuse, under the circumstances, to carry out your part of the agreement. We have no one in St. Louis to whom we could make a sale. We would ask that you do what you can to dispose of the car at once, and in the meantime we will have to refuse your draft."

The plaintiff received from the carrier at Toledo, Ohio, this letter: "Will you please advise disposition at once car of beans from Chesaning, Michigan, October 13th, to your order East St. Louis. Shipment is in our way." About that time the plaintiff learned that the car was in the "Belt Warehouse," East St. Louis. On December 16, 1896, the plaintiff wrote the defendant: "The car of beans at St. Louis is still there, and I have ordered same into a warehouse, as it is impossible to do anything with the declining market." On December 17, 1896, the defendant answered: "We trust you will be able to dispose of the St. Louis car to advantage a little later." The plaintiff replied to that letter: "If no disposition Saturday, store; insure 500 my account." On February 12, 1897, the plaintiff telegraphed to the defendant: "Am offered 75 cents St. Louis car, October 19; advise what to do." On the same day the defendant telegraphed to the plaintiff: "Have nothing to say about St. Louis car."

The plaintiff placed the beans in the hands of Moore Bros., of St. Louis, Mo., for sale in April, 1897. They tried to sell the beans from that time until August 25, 1897, when the

car load was sold for $348.60, from which amount was to be deducted $134.10 warehouse charges, and $10 brokerage, making $144.10, leaving the net amount realized $204.50.

The contract being plain and unambiguous, and thus in writing, there is no room for any controversy or the admission of parol evidence as to its meaning. The defendant was to ship the beans immediately. The plaintiff was to pay $1.03 per bushel for the beans, to be delivered at East St. Louis. The plaintiff had contracted to sell the beans on the same day he contracted to buy them. The next day the defendant was directed to hurry up, and eight days afterwards that the purchaser was waiting. Three weeks after the plaintiff's contract to purchase from the defendant and his contract to sell to the St. Louis party, that party had canceled his contract with the plaintiff by reason of the defendant's delay in delivering the beans at St. Louis. A week afterwards the defendant in writing admitted its responsibility for such delay. The defendant declined to take the beans back, or to take charge of the sale, or to advise what should be done with them. The trial court properly held, in effect, that if it could be shown that there was any unnecessary delay which led to loss, or if the beans were dealt with improperly, that might be considered in the reduction of damages; that if the defendant had any evidence tending to reduce the damages he would hear it. We perceive no error in holding, as a matter of law, that the defendant is liable for such damages as were caused by the unnecessary delay in delivering the beans at St. Louis. The question whether the carrier was liable for such delay is not here involved.

But the damages claimed and allowed are clearly excessive. We are not aware of any rule of law which authorizes a recovery for expenses to Saginaw, for a lawyer at East St. Louis, and moneys paid for photographs, telegrams, exchange, and sundries. Actionable damages for a breach of

a contract are limited to such as are reasonably considered to have been in contemplation of the parties, at the time of making such contract, as the probable result of its breach. *Bradley v. C., M. & St. P. R. Co.* 94 Wis. 46; *Kennedy v. South Shore L. Co.* 102 Wis. 288. Here the net receipts on the final sale were $204.50. Deducting this from the amount paid by the plaintiff on the defendant's draft, October 22, 1896, $450.50, with $23.15 interest thereon, making $473.65, leaves $269.15, with interest thereon from the time of the recovery of the verdict, as the true amount which, upon this record, the plaintiff is entitled to recover.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial, unless the plaintiff, within thirty days after filing the *remittitur* herein, elects to remit such excess and take judgment for the true balance as stated, in which case judgment is to be entered for that amount in favor of the plaintiff, with costs. Rule XXXII of this court.

BARDEEN, J., took no part.

108	520
111	[4]651
111	[4]653
111	[3]654
108	520
116	349

MOREY, Appellant, vs. FISH BROS. WAGON COMPANY and another, Respondents.

December 8, 1900 — January 8, 1901.

Corporations: Sale and pledge of stock: Equity: Compelling recognition of stockholder's rights: Declaration of dividends: Fraud: Limitation of actions: Jurisdiction of circuit and county courts: Estates of decedents.

1. A complaint showing that a contract by which a corporation was to sell shares of its stock to plaintiff had been so far performed as to place the title to the shares in plaintiff, though they were left in the hands of a pledgee to secure payment of plaintiff's note for

the purchase price, and that the action was brought to compel recognition of his rights as a stockholder, which had been fraudulently or wrongfully denied him, and for incidental relief by way of an accounting to ascertain the profits accruing upon his stock which should have been declared as dividends and applied upon his said note, is *held* on demurrer to state an equitable cause of action against the corporation, although the heirs of the pledgee, who are alleged to hold all the stock of the corporation, but do not appear to have any title to plaintiff's shares, are not made parties to the action.

2. Although the action was not commenced until more than nine years after the making of the contract and the pledging of plaintiff's shares, yet, plaintiff's right to the shares not having been denied until a short time before the commencement of the action, and his note for the payment of which they were pledged not having been paid by the application of declared dividends as provided in the contract, the action was not barred either by the six-year statute of limitations (subd. 3, sec. 4222, Stats. 1898) or by laches.

3. Although courts will not, as a general rule, interfere with the discretion of the directors of a corporation as to the declaration of dividends, yet when it appears that they are guilty of fraud or bad faith or a wilful abuse of their discretionary powers either in declaring or in refusing to declare a dividend, a court of equity will interfere and compel the proper action. [Whether the directors must be joined as parties to the action, in order to obtain such relief, not determined.]

4. The circuit court has jurisdiction of an action for equitable relief which is obtainable only in a court of general jurisdiction, even though the interest or right in question is connected with the estate of a deceased person, which is in course of administration in the county court.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Reversed.*

This is an action in equity brought by the plaintiff against the *Fish Bros. Wagon Company*, a private corporation engaged in the manufacture of wagons at Racine, Wis., and *O. W. Johnson*, as administrator of the estate of O. R. Johnson, deceased. The complaint alleges, in substance:

That on the 8th of May, 1889, the plaintiff entered into a

written contract with the defendant *Fish Bros. Wagon Company*, of which the following is a copy:

"Racine, Wisconsin, May 8th, 1889.

"*Mr. D. J. Morey*—DEAR SIR: In accordance with our talk with you the other day, we herewith make you the following proposition: For your services in our employ in any capacity as may hereafter be determined upon, we will pay you a salary of eighteen hundred ($1,800) dollars per year, and in addition we will agree to secure for you one hundred and fifty (150) shares of stock of this company; you to pay us for the same out of the earnings or dividends of the company, as rapidly as declared, with interest at the rate of seven per cent. (7%) per annum from January 1st, 1889. Evidence of such indebtedness to be declared on your part by giving us your note dated January 1st, 1889, bearing interest at the rate of seven per cent. (7%) per annum, payable annually, for six thousand ($6,000) dollars. It being understood that said interest, as well as principal, is to be paid out of the dividends of the company, and not deducted from your salary or expected from your other resources, unless the latter furnish you with sufficient income to meet such indebtedness, which is to be determined by yourself. As security for such unpaid stock, you are to leave with us the certificate for same until it is paid for.

"Yours respectfully,

"FISH BROS. WAGON COMPANY,

"by *O. W. Johnson*, Treasurer.

"I accept the above proposition. D. J. MOREY."

That immediately after the execution of said contract, and on the same day, the plaintiff executed his promissory note, dated January 1, 1889, for the sum of $6,000, with interest at seven per cent., payable annually, in accordance with the conditions of said contract, and delivered said note, by direction of the defendant corporation, to said O. R. Johnson, and at the same time there was placed in the hands of said

O. R. Johnson, in accordance with said contract, 150 shares of the capital stock of the *Fish Bros. Wagon Company*, of the par value of $100 per share, and a receipt therefor was delivered to the plaintiff, in words and figures as follows:

"Racine, Wisconsin, May 8th, 1889.

"Due *D. J. Morey* 150 shares stock of *Fish Bros. Wagon Co.*, held by me as security for payment of a certain note of $6,000, dated January 1st, 1889, as per terms of contract made this day between *Fish Bros. Wagon Co.* and *D. J. Morey*.

"O. R. JOHNSON,
"by *O. W. Johnson*."

That after the execution of said papers the plaintiff began to work for the defendant corporation on the same day as general superintendent and assistant superintendent of certain departments, and continued so to work until about the 1st day of November, 1893. That he faithfully discharged his duties during all of said time, and that during said time the business of said defendant corporation was prosperous and successful, and that it earned large profits, and that on the 1st day of November, 1893, his services were temporarily dispensed with by the officers of the corporation, for the reason, as they alleged, of the general depression in business matters. That from said 1st day of November, 1893, until the bringing of this action, the plaintiff has held himself in readiness to perform the duties required of him under said contract, and frequently tendered his services to said corporation, but has been refused employment, and said defendant corporation still refuses to employ him. That said *Fish Bros. Wagon Company* is a domestic corporation, with a capital stock of $250,000, divided into 2,500 shares, of the par value of $100 each, and that such stock, by reason of the profits arising from said business, has a cash value largely in excess of its par value, but that the same has never been for sale upon the market, and cannot be procured except by private sale, and none has ever been offered for sale. That said defend-

ant corporation since the year 1889 has manufactured and sold wagons and other vehicles to the following amounts: In the year 1889, about $360,000; in the year 1890, about $550,000; in the year 1891, about $550,000; in the year 1892, about $575,000; in the year 1893, about $350,000; in the year 1894, about $300,000; in the year 1895, about $325,000; in the year 1896, about $300,000; in the year 1897, about $550,000; and during the year 1898 more than during any other year of its existence. That the net profits arising from said business during the years aforesaid have been largely in excess of ten per cent. of the gross sales, and that the profits accruing upon the stock purchased by the plaintiff have more than paid the plaintiff's said note and the interest thereon. That the plaintiff on three occasions prior to the commencement of this action, viz. October 8, 1898, and in November, 1898, and on December 28, 1898, demanded of said defendant corporation and of the defendant *O. W. Johnson*, as administrator of the estate of O. R. Johnson, deceased, the delivery of said 150 shares of capital stock, and also demanded an accounting by said defendant corporation of the profits of said business, but that said defendants refused to deliver said stock and make said accounting, and still refuse to do so. That all of the capital stock of said *Fish Bros. Wagon Company* is now held by the heirs of said O. R. Johnson, deceased, to wit, Emily Johnson, Otis W. Johnson, Mary Johnson Abbott, Jennie Johnson, Charles Johnson, Thomas Johnson, and Frank Johnson, and that said heirs have absorbed all the earnings and profits of said business, and that no dividends have been declared, and that said defendants refuse to account with the plaintiff or declare dividends earned by said stock, so as to defraud the plaintiff in the premises, and seek to excuse the delivery of the stock so purchased by the plaintiff by assuming that, because there have been no dividends declared, the plaintiff is entitled to nothing. That said defendant corporation and its stock-

holders are using all of the funds of said corporation, and refuse to account with the plaintiff for the stock purchased by him, and that, upon a just and true settlement and accounting of the profits of the business, it would appear that the plaintiff's stock had earned a sum very much in excess of the amount of said note.

The relief prayed was that an account be taken of the profits of the business of the defendant corporation, and that the profits upon the stock of the plaintiff be applied upon the plaintiff's note, and that the same be canceled (the plaintiff being ready to pay to the defendant what, if anything, shall appear to be due upon said note), and that the defendant corporation be decreed to specifically perform said agreement with the plaintiff and deliver said 150 shares of capital stock to the plaintiff (the plaintiff being willing to pay anything that appears to be due said defendant upon the accounting), and that the defendant corporation pay to the plaintiff all earnings and profits of said stock in excess of the amount of the plaintiff's note.

To this complaint the defendant *Fish Bros. Wagon Company* demurred on three grounds: first, that the plaintiff has an adequate remedy at law; second, that the complaint does not state facts sufficient to constitute a cause of action; and, third, that the action was not commenced within the time limited by law, to wit, by subd. 3, sec. 4222, Stats. 1898. The defendant *O. W. Johnson*, as administrator of the estate of O. R. Johnson, deceased, demurred upon the same grounds, and upon the additional ground that the court has no jurisdiction of the person of the said defendant or of the subject of this action. The demurrers were heard together and sustained by the court, and the plaintiff appeals.

For the appellant there were briefs by *William E. Lee*, attorney, and *Millard R. Powers*, of counsel, and oral argument by *Mr. Powers*. In support of the complaint they cited *Tucker v. Lovejoy*, 73 Wis. 66; *Walker v. Goodrich*, 16

Ill. 341, and cases cited; *Adams v. Fort Plain Bank*, 36 N. Y. 255; 13 Am. & Eng. Ency. of Law, 726; *Miller v. Drane*, 100 Wis. 4; *Gullickson v. Madsen*, 87 Wis. 19; Morawetz, Priv. Corp. (2d ed.), § 218; *Avery v. Ryan*, 74 Wis. 596; *Johnson v. Brooks*, 98 N. Y. 337; *Franey v. Warner*, 96 Wis. 222; *Meyer v. Garthwaite*, 92 Wis. 571.

For the respondents there was a brief by *Quarles, Spence & Quarles*, and oral argument by *George Lines*. They contended, *inter alia*, that a court of equity will not aid a party who has unreasonably delayed the enforcement of his rights; and this rule is particularly applicable where the property which is the subject of litigation is liable to frequent changes in value, as stocks, oil wells, mining property, and the like. *Rogers v. Van Nortwick*, 87 Wis. 414; *Williams v. Williams*, 50 Wis. 311; *Combs v. Scott*, 76 Wis. 662; *Melms v. Pabst B. Co.* 93 Wis. 153; *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352; Pomeroy, Contracts, § 403; 22 Am. & Eng. Ency. of Law, 1043.

WINSLOW, J. The principal contention made by the defendants in support of the demurrers is that the action is one for specific performance of an agreement to sell corporate stock, and that the complaint shows on its face that such performance is impossible, because all of the corporate stock of the corporation is alleged to be held by third persons, not parties to the action, and that for this reason equity will not entertain jurisdiction of the action, but will leave the plaintiff to prosecute his action at law for damages. The radical difficulty with the argument is that, in our judgment, this is not an action for specific performance of a contract to sell stock. The allegations of the complaint show that the executory contract to sell stock was fully performed by the defendant corporation, at least so far as necessary to place the title of the stock in the plaintiff, upon the same day that the contract itself was made. Certificates of the stock were either

made out or obtained by the defendant company, a note was executed by the plaintiff for the purchase price, and with the consent of both parties the note was placed in the hands of Mr. O. R. Johnson, and the certificates of stock were also placed in his hands as collateral security for the payment of the note. Thereafter Mr. Johnson undoubtedly held the certificates of stock in trust for *Morey*, and the note in trust for the corporation, until the note should be paid. *Morey* had title to the stock to the same extent as if the certificates had been actually delivered to him and he had then pledged them to a third person as security for the payment of his note. Both the title and the right to vote pledged stock is in the pledgor unless a complete transfer has been executed. 1 Morawetz, Priv. Corp. (2d ed.), § 483. Thus it appears that the action is not one brought by an outsider to compel the corporation to make him a stockholder, but an action brought by one who is already a stockholder to compel recognition of his rights as a stockholder, which have been fraudulently or wrongfully denied him, and for incidental relief by way of accounting to ascertain what the profits upon his stock rightfully are, and what, if anything, is still due upon his note. Actions in equity for this purpose are not infrequent. 1 Morawetz, Priv. Corp. (2d ed.), § 208; *Telegraph Co. v. Davenport*, 97 U. S. 369. Nor is it any answer to the proposition to say that the complaint shows that all the stock of the corporation is now held by third persons, i. e. the heirs of Mr. Johnson, who are not parties to this action. So far as appears by this complaint, such holders have no title to the stock of *Morey*, even if they in fact have possession of the certificates. Both the corporation and Mr. Johnson were fully aware of *Morey's* ownership of the stock. It does not appear that *Morey* himself ever indorsed the certificates or made any written transfer of them. In fact, the fair conclusion from the allegations of the complaint is that the certificates never manually reached his possession. The statute

requires the indorsement of the owner or his legal representative, or a written transfer, in order to pass title to such certificates. Stats. 1898, sec. 1751. Hence, under the allegations of the complaint, the heirs of Mr. Johnson cannot be considered as *bona fide* holders of the certificates, nor as possessing any rights therein beyond the rights possessed by Mr. Johnson himself, because the reasonable inference from the complaint is that there has been no indorsement or transfer of the stock by *Morey* or his legal representative. They certainly would be proper parties to the action, and it may well be that, in order to fully determine the whole controversy, it may be necessary that they should be made parties; but there is no demurrer here based upon the ground of defect of parties, and it cannot be said that a cause of action is not stated against the defendant corporation simply because the Johnson heirs are not made parties.

These considerations effectually dispose of the claims of respondents to the effect that no equitable cause of action is stated and that there is an adequate remedy at law. It is urged, however, that the action is barred by the six-year statute of limitations. This contention is based on the ground that the complaint shows that the stock was paid for by the profits of the business as early as January 1, 1892, and that this action was not commenced until after December 28, 1898; thus showing that more than six years have elapsed since the cause of action accrued. A single consideration, however, disposes of this claim. Under the allegations of the complaint, as before shown, *Morey* has been the owner of this stock since May 8, 1889, and Johnson simply held it as pledgee and in a certain sense as plaintiff's trustee. It appears by the complaint that the first denial of *Morey's* right to the stock took place in October, 1898. Up to that time, so far as appears from the complaint, his right to the stock was not denied, and it did not become his duty to bring an action to establish his rights so long as

they were either admitted or not repudiated. He was not required, under his contract, to pay for the stock at any specified time. It was to be paid for primarily out of dividends *declared*, not profits earned, and it appears that there have been no dividends declared, hence it is clear that there was no time prior to the denial of his rights, in 1898, when there arose any obligation either to sue for his stock or to enforce his rights as a holder of stock. Neither his title to the stock nor his rights as a stockholder had up to that time been denied. *Wells v. Green Bay & M. C. Co.* 90 Wis. 442. The same considerations dispose of the claim that the plaintiff has been guilty of laches.

It has been noted that the contract is that the stock should be paid for in dividends *declared*, not in profits earned, and that the complaint affirmatively shows that no dividends have been declared. From this it may perhaps be argued that the court has no power to adjudge the stock paid for out of earnings, however large, because only the directors of the corporation have power to declare dividends, and they have not done so. It is undoubtedly true that the courts will not, as a general rule, interfere with the discretion of the directors of a corporation as to the declaration of a dividend; but when it appears that they are guilty of fraud or bad faith, or a wilful abuse of their discretionary powers, either in declaring or in refusing to declare a dividend, a court of equity will interfere and compel the proper action. 2 Cook, Corp. § 545; 1 Morawetz, Priv. Corp. (2d ed.), § 447. As we construe the present complaint, it is charged that the failure to declare dividends here has been in bad faith, for the purpose of defrauding the plaintiff, and we think a sufficient case is stated to call for investigation of the question by the court. Whether it may not be necessary to join the directors of the corporation as parties to the action, in order to obtain such relief, may be an important

question, but it is one which does not arise on the record before us.

The contention on the part of the administrator of the estate of O. R. Johnson that the circuit court has no jurisdiction, because any claim against the estate should have been made in the county court, cannot be sustained. It is very evident that the county court could not afford the plaintiff any adequate remedy. The action is one rightly brought to administer equitable relief, obtainable only in a court of general jurisdiction; and the right to administer that relief is not lost because the interest or right is connected with the estate of a deceased person, which is in course of administration. *Gianella v. Bigelow*, 96 Wis. 185. While the allegations of the complaint are not as full as might be desired, we think it sufficiently appears from the complaint, giving it that liberal construction to which it is entitled (Stats. 1898, sec. 2668), that the estate of O. R. Johnson, deceased, is necessarily so far connected with the subject matter of the litigation that the administrator is a proper party defendant.

By the Court.— Order reversed, and action remanded with directions to overrule the demurrers.

BARDEEN and DODGE, JJ., took no part.

ALBRECHT, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

December 10, 1900—January 8, 1901.

Railroads: Injury to fireman: Assumption of risk: Reliance upon engineer's promise to remove danger.

1. As a locomotive was backed out of the roundhouse the fireman, who had never before made a trip on that particular engine, called the engineer's attention to the absence of the proper metallic shield on

the indicator glass of the lubricator, telling him he must get a shield, and the engineer promised to do so. The place to procure a shield was at the roundhouse. The fireman knew fully the danger of leaving the glass unguarded. The engine did not start on its trip until about two hours later, during which time it was located at some distance from the roundhouse, and the fireman was with it, working about the cab, with every opportunity to observe whether the shield was put in place or not; and when the engine started on its trip he must have known that the glass was still unguarded. About three hours later, during the trip, the glass exploded, causing injury to the fireman. *Held*, that he had assumed the risk. The reasonable time during which, if at all, he might continue in the service upon the faith of the engineer's promise to procure the shield, expired when the engine started on its trip.

2. Whether in such case the engineer stood in the master's place in respect to guarding the glass so as to provide a reasonably safe place in which the fireman might work, so that the fireman had a right to continue at work upon the faith of the engineer's promise, is considered but not decided.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action for personal injuries. The wrong complained of was negligence of the defendant in failing to furnish plaintiff a reasonably safe place to work. Plaintiff was a locomotive fireman. The defect in his working place was absence of a metallic shield commonly placed in front of the indicator glass on the appliance for supplying the steam cylinders of the engine with oil. The appliance was located conspicuously in the engine cab so that the occupants thereof could see by observation, at any time when the indicator glass was exposed to view, whether it was supplied with oil and whether oil was regularly and properly flowing from the magazine to the steam cylinders. The mechanism of the appliance, the connections between it and the steam boiler, its location and operation, so far as relates to this case, were substantially as follows:

There was a cylinder about five inches in diameter and six inches high, on top of which was a small expansion

chamber about four inches high, with a connection between the two. In the bottom of the cylinder was a connection about two inches in length furnished with a stopcock, so that when the device, by means of such connection, was attached to the boiler, steam could be made to pass through such connection to the cylinder or not, it being governed by the stopcock. The passage of steam into the cylinder was necessary to the operation of the device. The steam created a pressure therein equal to the pressure in the boiler. In front of the cylinder near the top was an aperture for charging such cylinder with oil, the aperture being closed by a plug. At the sides of the cylinder were two glass tubes, each about one half inch in diameter and one and one-half inches long, connected with the cylinder substantially in the manner water indicator glasses are connected with a steam boiler. Such glass tubes were protected from being broken by force from without, and, in case of their being broken by force from within, the flying of glass and other substances imperiling the personal safety of the occupants of the cab was prevented, by shields, completely encircling them, consisting of metallic strips about one fourth of an inch wide, placed about one fourth of an inch apart and one half inch from the glass. When the device was in operation oil passed from the cylinder or oil magazine through the side indicator glasses in drops in reaching the steam cylinders. By observing the side glasses one could readily see whether the device was operating properly. In front of the oil magazine was located a glass tube about four inches long and one half inch in diameter, attached to and connected with the cylinder in the same manner as a steam boiler indicator glass, its purpose being to enable an observer to see whether the cylinder was supplied with oil and the amount thereof, as before stated. There was commonly placed in front of the glass a metallic plate held in place by slots into which the ends were inserted, the plate

being bent so that when in position with the concave side toward the glass it would pass in front thereof about half way around on each side and be about one half of an inch from the glass. The purpose of the shield was to protect the glass from force from without, and, in case of its bursting from any cause, to prevent pieces thereof or other substances thereby released from imperiling the personal safety of the occupants of the cab. There was no way of observing the glass, to determine whether the device was supplied with oil, without removing the shield by the hand. A simple movement only was necessary for that purpose. It required but an instant to remove the shield and replace it after taking an observation. The entire length of the device was about fourteen inches. It was attached to the boiler at the top and just in front of the cylinder head, the point of attachment being about one foot above the head of a person of plaintiff's height as he stood upright on the cab floor.

On the occasion of plaintiff's injury there was no shield on the large indicator glass. The glass was well recognized as a part liable to break at any time, and liable to stand use for a long period of time without breaking, though the probability of its breaking with dangerous consequences to the occupants of the cab in case of a shield not being in place was such that such a protection was recognized as required by reasonable prudence. Plaintiff was fully acquainted with the dangers mentioned. His knowledge in that regard was exceptionally great. He had had some eight years' experience as fireman before receiving his injury, during which time he had known of several explosions of lubricator glasses, on one of which occasions he received a personal injury. The stock of shields to draw from in case of need was usually kept in the storeroom at the roundhouse, and the only way the engineer had of getting one was by a written requisition. The course of business in handling a locomotive was for the

engineer in charge to turn it over to the roundhouse foreman at the end of his trip with a report of its condition, and for such foreman to turn it over to the engineer next in order to take it out in proper condition for service.

On the occasion material to this case the locomotive was taken out with plaintiff as the fireman. There was no shield on the indicator glass and had not been for several days. He knew about 5 o'clock in the afternoon that he was going on the trip, and the locomotive to be used, being informed thereof by the roundhouse foreman. He had never before made a trip on that particular engine. He saw it at the time of receiving notice from the roundhouse foreman as aforesaid, and performed some duties in and around the same in respect to putting it in order for the trip, such as filling the lamps and looking after the supply of oil. About 7:15 p. m. he boarded the engine and found the engineer there. He filled the pump lubricator and did his duties in respect to making ready for the trip. About 8 o'clock, as the engine was backed out of the roundhouse, plaintiff observed that the front indicator shield, before mentioned, was not in place, and informed the engineer of that fact. Immediately thereafter the plaintiff looked in his seat box to find a shield, and failing in that he remarked to the engineer, "You must get a shield for this lubricator," to which the engineer replied, "All right, I will get one." By reason of some delay in the railway service the engine did not proceed on its trip till about two hours after the conversation related occurred, during which time plaintiff was in and out of the cab and performed his duties in keeping up the fire and keeping the engine ready to start as soon as orders were received to do so. The engineer, in the meantime, was out of the cab some, his whereabouts not being all of the time known to plaintiff. The engine during all of the time was located a considerable distance from the roundhouse, and the engineer had little opportunity to obtain a shield without

his movements in that regard being brought to plaintiff's attention. Plaintiff testified that after the conversation with the engineer he paid no further attention to whether the promise to obtain a shield was kept or whether there was a shield on the indicator glass. There was evidence to the effect that the engineer had no authority to hire or discharge his fireman. There was no evidence as to the duty being intrusted to the engineer to see that the shield was kept on the lubricator glass. Plaintiff had proceeded on his trip about fifty miles and arrived at Kewaskum station before the injury occurred. At such station, while waiting for a train to pass, about 1 o'clock a. m., plaintiff was standing beside his seat box eating his lunch, when the lubricator glass burst and flying pieces of glass struck him in the face causing him to involuntarily move backward and fall out of the cab to the ground, striking on his back, thereby receiving severe injuries.

Plaintiff admitted on the trial that he had previously testified under oath that he knew all the time the condition of the lubricator, and that such testimony was true. There was also evidence tending to establish or establishing what has been related, and there was other evidence upon which it was claimed by plaintiff's counsel that the failure to have the shield on the lubricator glass rendered plaintiff's position in the cab unreasonably dangerous; that he submitted to such danger relying on the promise of the engineer, made at the time the engine left the roundhouse, to supply a shield for the glass; and that up to the time of the accident he was ignorant of the engineer's failure to keep such promise.

At the close of the evidence counsel moved the court for the direction of a verdict, which motion was denied. The case was then, under instructions from the court, submitted to the jury for a special verdict, with substantially the following result:

(1) Plaintiff was injured by an explosion of the lubricator on defendant's engine, December 24, 1897.

(2) The glass was not protected by a shield at the time of the accident.

(3) The defendant was guilty of a want of ordinary care in omitting to have the shield in place.

(4) When plaintiff left the roundhouse he informed the engineer of the absence of the shield.

(5) Thereupon the engineer promised to procure a shield.

(6) Such promise was not performed.

(7) Plaintiff did not know when he started on his trip that no shield had been placed on the lubricator.

(9) He continued his work relying on the engineer's promise.

(10) His continuance, relying upon the engineer's promise, was not for a longer time than an ordinarily prudent person would expect the engineer would need to keep his promise in.

(11) The danger to be apprehended from the absence of the shield was not so obvious, great, immediate, and constant that a person of ordinary care, under the circumstances, would not have subjected himself to it.

(13) A person of ordinary care, possessing the knowledge of plaintiff of the danger to be apprehended from an unprotected lubricator glass, would have remained on the engine under the circumstances.

(14) Plaintiff's liver was displaced as a natural and direct result of the accident.

(15) Plaintiff is suffering from a spinal-cord injury as a direct result of the accident.

(16) The absence of a shield upon the lubricator glass was the proximate cause of plaintiff's injury.

(17) Plaintiff's damages are measured by $8,000.

Judgment was rendered in plaintiff's favor in accordance with the verdict, exceptions being saved to rulings on evidence and other rulings upon which the errors assigned on this appeal and discussed in the opinion are based.

Edward M. Hyzer, for the appellant.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles* and *George Lines*. They contended, *inter alia*, that the plaintiff relied upon the promise of one who was charged by the master with the duty of providing this appliance. He was his immediate superior. The objection was made seasonably to the proper and only source, and the promise of the engineer was the promise of the company. This would be the law, even though a corresponding duty to furnish a shield rested also upon the roundhouse foreman. *Homestake M. Co. v. Fullerton*, 69 Fed. Rep. 923–928; *Dells L. Co. v. Erickson*, 80 Fed. Rep. 257; *Brabbits v. C. & N. W. R. Co.* 38 Wis. 298, 299; *Bessex v. C. & N. W. R. Co.* 45 Wis. 477; *Heine v. C. & N. W. R. Co.* 58 Wis. 530; *Belair v. C. & N. W. R. Co.* 43 Iowa, 662; *Railroad v. Kenley*, 92 Tenn. 215; *Gulf, C. & S. F. R. Co. v. Brentford*, 79 Tex. 619; *Cudden v. Am. S. B. Co.* 88 Wis. 419.

MARSHALL, J. It is rightly contended by appellant's counsel, and conceded by counsel for respondent, that unless as a matter of law, on the evidence, the engineer stood towards the respondent in the master's place, charged with its duty to furnish him a reasonably safe place in which to perform his work, as regards the guarding of the lubricator glass, and there was reasonable ground on the evidence for the finding that he submitted himself to the risk which resulted in his injury upon the faith of the engineer's promise to perform that duty, and was not guilty of any want of ordinary care in so doing, the judgment is wrong. The jury did not find whether the engineer and respondent were fellow-servants in respect to the matter stated. Perhaps no finding was necessary. Probably it should be said that the evidence bearing on the subject is undisputed and that the inferences that may reasonably be drawn therefrom are not conflict-

ing. Yet, just how the learned court reached the conclusion that the relation existed, requisite to charge defendant with the engineer's promise, does not clearly appear.

Generally speaking, all trainmen, from engineer to the humblest employee, are fellow-servants and only such. *Howland v. M., L. S. & W. R. Co.* 54 Wis. 226; *Heine v. C. & N. W. R. Co.* 58 Wis. 528; *Fowler v. C. & N. W. R. Co.* 61 Wis. 159; *Pease v. C. & N. W. R. Co.* 61 Wis. 163; *Southern Fla. R. Co. v. Price*, 32 Fla. 46; *Ohio & M. R. Co. v. Tindall*, 13 Ind. 366; *Clifford v. O. C. R. Co.* 141 Mass. 564; Elliott, R. R. § 1330. To take the situation in question out of that general rule requires evidence to the effect that the furnishing of the guard for the lubricator glass was not only the duty of the master — a duty distinct from those minor details of business which may be left to servants, as such, to attend to — but that the master intrusted such duty to the engineer. Where the evidence is to that effect, as before indicated, does not clearly appear. It may be that the idea of the trial judge was that since the engineer was superior in grade of service to his fireman, the relation of master and servant existed between them. But that is not the test, as is abundantly shown by the adjudications of this court above cited. Mere rank has nothing to do with the question. The test is the nature of the act in which the persons are engaged. *Cadden v. Am. S. B. Co.* 88 Wis. 409; *Dwyer v. Am. Exp. Co.* 82 Wis. 307; *McMahon v. Ida M. Co.* 95 Wis. 308. Under that rule a foreman, or other person superior in authority and responsible to another as master, and the men under him, so far as relates to the work in which they are jointly engaged, though in different capacities and though such foreman or other person has authority to hire and discharge such men, are fellow-servants. But we will not pursue this subject further or decide this branch of this case. Some attention has been given to it so the case will not be referred to hereafter as holding that in such a situation as the one in

question the promisor must be regarded as standing in the place of the master.

We may now proceed to the next and vital point in the case on the assumption, for the purposes of the decision, that it was actionable negligence for defendant to leave the lubricator glass unguarded; that the duty to attend to that matter was intrusted to the engineer; that as the engine left the engine house respondent objected to continuing in defendant's service unless it was attended to, and that the engineer then promised to do so.

Now it is claimed by counsel for appellant, and conceded by respondent's counsel, as is the law, that if an employee object to continuing in the service of his master because of some danger attending the same which it is the duty of the latter to remedy, he may, relying upon the master's promise to perform that duty, remain in such service for such reasonable length of time as may be required for that purpose, if the danger be not so obvious and immediate that from his standpoint it should be remedied at once; yet when such reasonable time shall have expired and the servant knows, or by the exercise of ordinary care ought to know, that the danger still exists, if he remains in the service and subjects himself to such danger he is chargeable with that form of contributory negligence known as assumption of the risk and is remediless for any injury that thereafter happens to him thereby.

When did the time expire within which the engineer should, in all reason, have redeemed his promise to place a guard upon the lubricator glass? The trial court seems to have determined from the undisputed evidence, as a matter of law, that it expired when the engine left the Milwaukee depot to go on the trip. That is clearly shown by the way the special verdict was framed. It contains findings favorable to respondent in regard to whether the engineer placed a shield upon the lubricator glass before the engine started

on the trip and whether respondent knew when such trip commenced that the glass was still unguarded, and the case was made to turn on such findings. However, strangely enough, the jury also found that plaintiff did not continue in defendant's employment longer than was reasonable for a person of ordinary care and prudence, under the circumstances, to expect that the engineer would procure the shield and place it upon the lubricator. That finding, with the others referred to, seems to convey very inconsistent ideas. Together they say a reasonable time to procure the shield and place it upon the lubricator expired when the engineer started out on his trip, yet respondent, as a person of ordinary care and prudence, may reasonably have expected the time for remedying the danger complained of had not fully expired when the injury happened, some three hours after the engine left Milwaukee.

That the promise should have been redeemed before the engine left Milwaukee, and that respondent so expected if he had any expectation that the lubricator glass would be guarded for the trip he was about to make, is too clear for reasonable controversy. There was no need for submitting that question to the jury, nor any other question bearing on the subject. The evidence was all one way that respondent had no personal interest in the condition of the lubricator except for the trip he was about to enter upon. He had never before been out with that engine, and of course did not know that he would be called upon to do so again. The place to procure the shield was at the roundhouse in the city of Milwaukee, which the engine was leaving when the promise was made, and to which it did not thereafter return. A few moments after the promise was made, and without any absences of the engineer to give respondent ground to believe that he had made a trip back to the roundhouse, the engine moved to the vicinity of the Milwaukee depot, a considerable distance away, and there it remained

nearly two hours before the start on the trip was made, during which time the engineer remained with it to the respondent's knowledge, and the latter was in the engine cab attending to his duty of keeping up steam, which duty required him to often look at the steam gauge located a little under the lubricator glass. If respondent expected the shield to be placed on the glass before going out on the trip, and we think the circumstances all indicate that he did not, when the opportunity for doing so no longer existed, obviously, the time for redeeming the promise had expired.

The verdict of the jury, to the effect that the time for removing the danger complained of had not expired when the accident occurred, is certainly without any evidence to support it. That finding is the only one directly on the subject of when the period covered by the promise expired, though, as before indicated, the way the verdict as a whole was framed shows that the trial court's view was, as the fact is, that such period can by no stretch of reason be extended into the time when the engineer no longer possessed the means of redeeming his promise before leaving the city of Milwaukee on the trip.

The conclusion from the foregoing is that, by going out on the trip under the circumstances, respondent assumed the risk of the condition of the lubricator, if he knew or ought to have known that the engineer had failed to keep his promise. The jury said he did not know that fact when the trip commenced, and that he proceeded relying on the promise. It is impossible, in our view, to find any reasonable ground in the evidence for those findings. They are contrary to all reasonable probabilities and contrary to the evidence of respondent. He regarded the absence of the shield as rendering his working place exceedingly dangerous. He knew that such absence was liable to result at any instant, and without any warning whatever to enable him to avoid it, in inflicting upon him a serious bodily injury. Every

reasonable probability supports the idea that his attention was naturally drawn, or should have been, to the condition of the lubricator, many times before he left Milwaukee. True, on principle he had a right to assume that the engineer's promise would be kept, but he could not continue to so assume when he had the evidence to the contrary right before him. If the defect had been located where it would not naturally have come under his observation, the presumption mentioned would excuse ignorance to a certain extent of the true situation; but it was not so located. The difficulty was in his immediate surroundings, at a point where he could not fail to observe it by reasonable attention to such surroundings. We may well say that it would have been very difficult if not well-nigh impossible for him to have worked in and about the engine cab two hours without observing the absence of the shield if he had tried to avoid seeing it. Much of the time he was where he could easily have reached the lubricator glass with his hand. It was many times within the range of his vision as he was about his work. It was not over two or three feet in front of him as he stood facing the boiler in the act of looking at the steam gauge or performing other duties, where he must necessarily have stood on many occasions, and it was only a little more than one foot above the level of his eyes. The idea that respondent worked within a few feet of the lubricator for two hours before leaving Milwaukee, yet did not observe that the glass remained unguarded, since the unguarded condition was deemed by him to be exceedingly dangerous, is so improbable that the wonder is how it could have found a place in the verdict or been approved by the trial court. The salutary limitation upon the power of a jury should not be forgotten, while, at the same time, such power should be firmly maintained to its full limit. As to what is the truth as established by evidence, within the realms of reasonable probability, in contemplation of law the judgment of a jury

is well-nigh infallible, and when approved by the trial judge is so. If they were permitted to go beyond that, the best system human wisdom has yet devised for discovering the truth would be sadly deficient indeed.

If respondent had testified that he looked at the lubricator and did not observe the absence of the shield, or, without having affirmatively testified that he so looked, had testified that he did not know of the absence of the shield at any time after the engineer's promise was made, the situation would not be changed. The finding of the jury would still be against all reasonable probabilities. But he did not so testify. His testimony is rather to the effect that he did know the true situation all the time up to the instant of the injury. He seems to have appreciated, in giving his testimony, the extreme improbability of a person circumstanced as he was being ignorant of those things which were almost before his eyes; so he contented himself in saying that he did not pay any attention to the condition of the lubricator. Counsel for defendant tried patiently, by a long and fair cross-examination, the record of which occupies many pages of the printed case, to obtain a direct answer from respondent as to whether he knew when the engine left Milwaukee that there was no shield upon the lubricator glass; and the trial judge participated to the same end, endeavoring by repeating the counsel's question and striking out nonresponsive answers and commanding the witness to answer responsively; still he persisted in saying that he did not pay any attention to the matter. After the many evasive answers referred to, the witness's attention was called to his examination under oath on a former occasion, and he then admitted that the following questions were there propounded to him and that he gave the following answers thereto: "*Q.* Do you swear that you did not see whether or not there was a shield on when your engine left the city of Milwaukee that night? *A.* After I spoke to the engineer about

the shield I paid no further attention to it. I knew that there was no shield on there. If there was I would have seen it. *Q.* You knew when you started out from Milwaukee that there was no shield on the lubricator, did you? *A.* Yes, I knew all the while there was no shield on the lubricator. If there had been one I would have seen the shield. *Q.* You still swear that you knew there was no shield on it when your engine started from Milwaukee? *A.* No; there was no shield on there. If there had been a shield on I would have known it. I paid no more attention to it." That was followed by questions as to whether the witness still adhered to his previous statements, as follows: "*Q.* Do you remember that testimony? *A.* Yes. *Q.* And that is true, is it? *A.* Yes." His answer, repeated many times, in terms or effect that he did not pay any attention to the lubricator after notifying the engineer of the absence of the shield, was entirely consistent with his knowing as a fact, when he left Milwaukee, that the shield was not in place. One cannot read his testimony as a whole and come to any other reasonable conclusion than that, from the physical situation, he must have been fully informed as to the absence of the shield, and that such testimony contains a full confession to that effect. The court should have so decided on the motion to direct a verdict for defendant, and failing in that should have so decided on the motions made on behalf of defendant after verdict, including the motion for judgment in its favor.

When the time expired for the engineer to redeem his promise, under the circumstances indicated, respondent was no longer protected thereby in his right to hold defendant responsible for the consequences of the danger, if it be conceded that the promise had that effect at all. In proceeding thereafter in defendant's service, he voluntarily assumed the risk of which he had complained, as a part of his contract of employment, and is remediless for what followed.

That is very unfortunate; but the law must not be turned aside from the definite lines upon which it has been established in order to fit the necessities of a party in a particular case. That cannot be done for the benefit of one person without committing a great wrong upon another. Neither can juries, as before indicated, be permitted to find one way to recompense an unfortunate person for his injury, when all reasonable probabilities are the other way. *Badger v. Janesville C. Mills*, 95 Wis. 599; *Roth v. S. E. Barrett Mfg. Co.* 96 Wis. 615; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Lee v. C., St. P., M. & O. R. Co.* 101 Wis. 352; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 330; *Wunderlich v. Palatine F. Ins. Co.* 104 Wis. 382. Courts must not overstep those wise limitations upon remedies for misfortunes, however serious they may be, to award compensation therefor. They fall within the maxim, *damnum absque injuria.*

By the Court.—The judgment of the superior court is reversed, and the cause remanded for a new trial.

BARDEEN, J., took no part.

As to the rights of a servant who continues work on the faith of the master's promise to remove a specific cause of danger, see note to *Illinois Steel Co. v. Mann* (170 Ill. 200), in 40 L. R. A. 781.—REP.

ROCHESTER MACHINE TOOL WORKS, Respondent, vs. WEISS, Appellant.

108 545
112 *127

108 545
114 * 66

December 10, 1900—January 8, 1901.

Account stated: Surcharging: Evidence: Duress: Court and jury: New trial: Newly discovered evidence: Interest: Computation by court.

1. In an action upon an account stated it was proper to exclude evidence by which it was sought to surcharge the account without having laid any proper foundation therefor.

2. What constitutes duress is a matter of law, and whether duress existed in a particular transaction is a question of fact for the jury; but where (as in this case) the evidence shows that there is no foundation for the claim of duress the court may so decide and take the case from the jury.
3. In an action upon an account stated the denial of a motion for a new trial on the ground of newly discovered evidence, consisting of a letter from plaintiff which it is claimed tends to dispute the justice of an item in the account, is *held* not an abuse of discretion.
4. In an action upon an account stated the inclusion, in a verdict directed by the court, of interest to which plaintiff was entitled, but which was not computed by any witness, was not error.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This action is upon an account stated. It appears that prior to September 21, 1895, the defendant had had dealings with plaintiff in the purchase and sale of machinery, and that there was an open and unliquidated account between them. A few days prior to the date last mentioned the plaintiff sent its agent to Milwaukee to make a settlement. The parties got together and spent about four days in looking over their accounts, and at the close the defendant signed a statement in writing, at the foot of the account, in which he admitted that he was indebted to plaintiff in the sum of $1,333.74. The answer set up false representations by plaintiff's agent and duress. After hearing the evidence, the trial court directed a verdict for the plaintiff for $1,540.46, upon which verdict judgment was duly entered. A motion for a new trial on the ground of error and newly discovered evidence was denied. Defendant appeals.

The cause was submitted for the appellant on the brief of *Dalberg & Becher*, and for the respondent on that of *Moe & Hansen.*

BARDEEN, J. We are asked to reverse this judgment on the following grounds: (1) Because the court erred in its rulings as to the admission of evidence; (2) because the

court erred in directing a verdict for plaintiff; (3) because the court erred in refusing a new trial on the ground of newly discovered evidence; (4) because the damages are excessive.

We will consider these questions in the order stated:

1. In considering this assignment of error, we will emulate the brevity of appellant's counsel. They have given us no reasons why they believe the court erred in rejecting evidence, but have contented themselves by citing the page of the case where the ruling was made and saying that it was erroneous. The rulings referred to show that defendant was attempting to surcharge the account in suit without having laid any proper foundation therefor. The rulings of the trial court were eminently proper. The letters that were sought to be introduced are not printed in the case or referred to in the brief. Counsel ought not to expect the court to hunt through a bill of exceptions to ascertain the basis of their complaints.

2. The one really substantial question in the case is whether the court was justified in directing a verdict for the plaintiff. The action was upon an account stated. The defense was duress. This court has so recently and so exhaustively discussed the question of what constitutes duress that it is unnecessary to do more than refer to the cases: *Wolff v. Bluhm*, 95 Wis. 257; *Mack v. Prang*, 104 Wis. 1; *Galusha v. Sherman*, 105 Wis. 263. The true rule, as stated in the last case cited, is as follows: "Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained?" What constitutes duress is a matter of law. Whether duress existed in a particular transaction is a question of fact for the jury. When it is perfectly evident from the testimony adduced that there is no foundation for a claim of

duress, the court may so decide and take the case from the jury. In this case the court saw and heard the witnesses. He was bound to give the defendant the benefit of every reasonable inference in his favor. Having done so, his conclusion will not be overturned unless error is manifest. We have carefully read the defendant's testimony, and are fully satisfied that, had a verdict for defendant been rendered, it could not stand. It would have been the plain duty of the court to have set it aside as being unsupported by the evidence. The parties were several days in looking over their accounts. Mutual claims and allowances were made. The defendant testifies that plaintiff's agent told him that he had committed grand larceny, and that he was liable to imprisonment in the state of New York; that he wanted him to get down to a settlement and make it good, or he would have him sent to state's prison in New York for grand larceny; that he (defendant) became nervous, "and was sweating like the deuce," and then signed the document. The defendant was apparently a man of intelligence and business experience, thirty-six years of age. He had dealt with plaintiff nine or ten years,—had sold their machinery and engines in different parts of the country. To claim that he was imposed upon and put in such fear as to be unable to understand what he was doing looks a great deal like self-stultification. The surrounding circumstances completely negative his claim of duress. Without spending further time in the discussion of the facts, we are satisfied that, upon the defendant's own showing, the court was amply justified in the ruling made.

3. The alleged newly discovered evidence consisted in the production of a letter from plaintiff which referred to an item in the account, and which it is claimed tends to dispute its justice. We cannot say the court abused its discretion in denying the motion.

4. Plaintiff made claim for $1,333.74 and interest from

September 21, 1895, the date the account was stated. The court directed a verdict for $1,540.46. The bill of exceptions fails to show any computation of interest made by any witness. The trial took place April 29, 1898. The difference between the two amounts, as shown by a computation, is the interest on the principal amount to the date of trial. No question is raised that plaintiff is not entitled to such interest, and the fact that no formal computation was made and offered in evidence is of no consequence. The court might, as he probably did, have made the computation and included it in the verdict. Certainly the defendant was not in any manner prejudiced thereby.

By the Court.— The judgment appealed from is affirmed.

KUENER, Appellant, vs. SMITH, imp., Respondent.

108 549
111 [2]206

108 549
117 [2]412

December 10, 1900 — January 8, 1901.

Statute of frauds: Covenants: Mortgages: Judgment for deficiency.

1. A covenant under seal is not within the statute of frauds (sec. 2307, Stats. 1898), providing that every special promise to answer for the debt of another person shall be void unless the agreement, or some note or memorandum thereof, expressing the consideration, be in writing, etc. The seal itself imports a consideration. Sec. 4195.
2. One who executes a deed under seal, containing a covenant on his part, jointly with the grantor of the land conveyed by the deed, to pay a certain mortgage on the land, becomes thereby "personally liable for the debt secured by the mortgage" and "upon the same contract which the mortgage is given to secure," within the meaning of sec. 3156, Stats. 1898; and upon foreclosure of the mortgage judgment for deficiency may go against him.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Reversed.*

For the appellant there was a brief by *Nath. Pereles & Sons*, and oral argument by *C. F. Hunter.*

For the respondent there was a brief by *Turner, Pease & Turner*, and oral argument by *W. J. Turner*. They contended, *inter alia*, that judgment for deficiency cannot be rendered against the defendant *Smith:* (1) Because it is not authorized by sec. 3156, Stats. 1898, he not being liable "upon the same contract which the mortgage is given to secure." (2) Because the promise of *Smith* was not made for the benefit of the mortgagee or upon any consideration whatever. The person to whom the promise was made was not liable for the mortgage debt. *Jefferson v. Asch*, 53 Minn. 446, 25 L. R. A. 257, 259, 272; *Vrooman v. Turner*, 69 N. Y. 280, 284. (3) Because the contract is void under the statute of frauds. It does not express the consideration.

CASSODAY, C. J. This is an appeal from that part of a judgment of foreclosure and sale which refused to give judgment in favor of the plaintiff for the deficiency against the defendant *Joseph G. Smith*. The issues raised by the complaint and the answer of the defendant *Smith* having been tried, the court, at the close thereof, made findings of fact and conclusions of law, among other things, to the following effect:

On May 2, 1892, the premises in question were purchased from one James G. Flanders by the defendants, Peter Doyle, *Joseph G. Smith*, and Gilbert Joyce, but the deed thereof was taken in the name of Peter Doyle, in trust for the purpose of transferring the title to a corporation to be organized. Such corporation was organized, with a board of directors and officers, to take the title to such premises. Stock was issued therein, and paid for by them respectively. The three defendants named were promoters of such corporation. *Smith* and Doyle advanced a part of the money to make such purchase. Doyle and wife, at the time of receiving the deed, gave back a note and mortgage for $5,000, as part of the purchase price, to Mary C. Flanders, wife of

the vendor. Joyce was to have stock for his services. On June 24, 1892, the $5,000 note and mortgage were duly assigned to the plaintiff by Mary C. Flanders, and the assignment thereof was duly recorded. On October 5, 1894, the time of the payment of such note and mortgage was extended for three years, and the interest increased from six to seven per cent. The premises were never conveyed to the corporation. The officers and directors arranged among themselves to abandon the corporation, and surrender the stock, and divide the premises among the stockholders by deeds to them, respectively, of fractional shares thereof according to their proportionate interest therein. Such deeds were made on or about May 28, 1895, with Peter Doyle and wife as grantors and such stockholders, respectively, as grantees. Such deeds were each under seal and duly executed, not only by Peter Doyle and wife, but also by the defendant *Joseph G. Smith*, and each recited that it was given "for and in consideration of the sum of one dollar and for other valuable considerations to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged," and also contained this clause: "And the said parties of the first part (Peter Doyle and wife), for themselves, their heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents they are well seised of the premises above described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and that the same are free and clear from all incumbrances whatever, *except a certain mortgage of $5,000, which said Peter Doyle and Joseph G. Smith, of Delavan, hereby agree to pay*, and that the above-bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lawfully claiming the whole

or any part thereof, they will forever warrant and defend." Such deeds were duly witnessed, acknowledged, and recorded. Doyle and *Smith* made default in the payment of such note and mortgage, and this action to recover the $5,000, with interest at seven per cent. from November 1, 1898, was commenced.

And as conclusions of law the court found, in effect, that the plaintiff was entitled to judgment of foreclosure and sale of the mortgaged premises to satisfy such note and mortgage, with costs and solicitor's fees; that, if the proceeds of such sale were insufficient to pay the whole amount, then that the plaintiff have judgment and execution for the balance thereof against Peter Doyle personally, but that the defendant *Joseph G. Smith* was not personally liable for the payment of the debt secured by the note and mortgage, or any part thereof, and that he was entitled to judgment against the plaintiff for $27.39, the amount of his costs. From that part of the judgment in favor of the defendant *Smith* the plaintiff brings this appeal.

The trial court held that the agreement on the part of *Joseph G. Smith*, contained in the deeds given by Peter Doyle and wife, and quoted above, was void, for the reason that, so far as *Mr. Smith* was concerned, it was a "special promise to answer for the debt, default, or miscarriage of another person," to wit, Peter Doyle; and, although in writing and subscribed by *Mr. Smith*, yet that it was repugnant to the statute, becaused it failed to express the consideration upon which such promise of *Mr. Smith* was based. Sec. 2307, Stats. 1898. That statute is a literal transcript from the statute of New York as it existed when ours was first adopted, except the omission of the words "to be" before the word "charged," which is necessarily implied. Sec. 2, tit. II, ch. VII, pt. II, 2 R. S. N. Y. 1829. In construing that statute it was held in that state at an early day that, although such promise is in writing, nevertheless it must express a

consideration in order to be valid, and yet that such expression need not be in any particular form, and that the words "for value received" satisfied the statute. *Douglass v. Howland*, 24 Wend. 35, 40; *Brewster v. Silence*, 8 N. Y. 207; *Miller v. Cook*, 23 N. Y. 495; *Smith v. Northrup*, 80 Hun, 65. This court followed such construction nearly fifty years ago, and repeatedly since. *Day v. Elmore*, 4 Wis. 190, 196; *Houghton v. Ely*, 26 Wis. 189; *Dahlman v. Hammel*, 45 Wis. 466; *Young v. Brown*, 53 Wis. 334. So it was held in New York nearly a century ago that "a covenant to pay the debt of another is not within the statute of frauds, which does not apply to writings under seal;" that "a covenant, of itself, imports a consideration." *Livingston v. Tremper*, 4 Johns. 416. The courts of that state have uniformly construed the words "agreement" and "special promise," as used in that statute, to refer to "simple contracts," and not to a "covenant under seal," which is so held not to be within that statute. *Douglass v. Howland*, 24 Wend. 35. In that case the whole question is learnedly discussed by Judge COWEN. Followed in *Ex parte Young*, 17 Ch. Div. 668. To the same effect, *Smith v. Northrup*, 80 Hun, 65. The statute of New York appears to have been modified in 1863, but that does not interfere with the authority of adjudications upon the former statute. *Drake v. Seaman*, 97 N. Y. 230. Our statute provides that a seal upon an executory instrument is "presumptive evidence of a sufficient consideration." Stats. 1898, sec. 4195. By executing the deed under seal, containing the covenant on his part jointly with Peter Doyle to pay the $5,000 note and mortgage, the defendant *Joseph G. Smith* became "personally liable for the debt secured by the mortgage," and "upon the same contract which the mortgage" was "given to secure," and hence was properly united as defendant in the action. Sec. 3156. We must hold that *Joseph G. Smith*, as well as Peter Doyle, is personally liable for any deficiency of the mort-

gage debt after applying the proceeds of the sale of the mortgaged premises.

By the Court.— That part of the judgment of the superior court of Milwaukee county in favor of the defendant *Joseph G. Smith* is reversed, and the cause is remanded with direction to enter judgment in accordance with this opinion.

BARDEEN, J., took no part.

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61 LRA 348

PUTNEY BROTHERS COMPANY, Appellant, vs. MILWAUKEE COUNTY, Respondent.

December 10, 1900 — January 8, 1901.

Counties: Paupers: Cure of inebriates: Ratification of unauthorized acts.

1. Neither the county board nor any county officer has any authority, under our statutes, to incur any liability for medical treatment of a pauper to cure him of inebriety as a disease.
2. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers.

APPEAL from an order of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

On November 20, 1899, the appellant filed with the county clerk of *Milwaukee County* a claim against said county in the sum of $130. This claim was for medical treatment, medicine, and board furnished by the Wisconsin Keeley Institute Company to one James Jelinck for the purpose of curing him of inebriety, and said claim was duly assigned to the appellant before presentation. The claim was disallowed by the board of supervisors, and the appellant thereupon appealed to the circuit court, where, by order of the court, a formal complaint was filed, which, after alleging the corporate character of the appellant and the defendant, further

alleged that the defendant has never had any institution for the treatment of inebriates, and now has no such institution; that on the 2d of September, 1896, one James Jelinck, a resident of *Milwaukee County*, was a pauper totally destitute of means, and was suffering from the disease known as inebriety, in the advanced stage; that on the said last-named date the said Jelinck was by the order of the county judge of *Milwaukee County* committed to the Wisconsin Keeley Institute (which was an institution equipped for the treatment of persons suffering from said disease), and that said Jelinck was thereafter treated by said Keeley Institute for said disease and cured of the same, which treatment extended for four weeks and was reasonably worth the sum of $130, including board and lodging; that said Jelinck was absolutely cured of said disease and is now a healthy, industrious, and prosperous man; that no part of said claim has been paid, and that the same was duly assigned to the appellant, which is now the lawful owner and holder thereof.

The complaint contained further allegations showing the proper presentment and disallowance of the claim by the county board, and the appeal from such disallowance, and, further, that the officers of the defendant county knew that said Jelinck was destitute and a pauper and was being treated by said Keeley Institute, and never objected to such treatment, and that said county received full consideration for said treatment, by reason of the cure of said Jelinck.

A general demurrer to this complaint was sustained, and from the order sustaining this demurrer this appeal is taken.

For the appellant there was a brief by *Ryan & Merton*, attorneys, and *Quarles, Spence & Quarles*, of counsel, and oral argument by *T. E. Ryan*. They cited *Rider v. Ashland County*, 87 Wis. 160; *State Board of Agriculture v. Citizens St. R. Co.* 47 Ind. 407; *Hitchcock v. Galveston*, 96 U. S. 341; Dillon, Mun. Corp. §§ 457, 464; *Alleghany City*

v. McClurkan, 14 Pa. St. 81; *Argenti v. San Francisco*, 16 Cal. 255; *Polk Co. S. Bank v. State*, 69 Iowa, 24; *Moore v. New York*, 73 N. Y. 238; *Seagraves v. Alton*, 13 Ill. 371; *Allen v. Cooper*, 22 Me. 133; *Wilson v. School Dist.* 32 N. H. 125.

For the respondent the cause was submitted on the brief of *Howard Van Wyck*, district attorney, and *A. C. Umbreit*, assistant district attorney.

WINSLOW, J. The complaint shows that Jelinck was committed to the Wisconsin Keeley Institute, to be cured of inebriety or habitual drunkenness, under the provisions of ch. 203, Laws of 1895. As this law was held unconstitutional by this court in the case of *Wisconsin Keeley Inst. Co. v. Milwaukee Co.* 95 Wis. 153, it is evident that no liability arose by reason of the commitment. This is admitted by the appellant, but it contends that it was the duty of the county to relieve and care for Jelinck, under sec. 1517, Stats. 1898, and that when this task has been performed by a private person, even without any previous commitment or contract, the county will be liable if its officers knew of the facts and made no objection and the pauper has been restored to health. The doctrine here invoked is that of ratification or estoppel.

There is considerable discussion, in the briefs, of the various statutes of the state with reference to the care and support of paupers, and the respective duties of towns and counties in that behalf, but we do not find it necessary to enter at length upon that field. The claim here is not for ordinary relief or care, but for the medical treatment of a pauper for what is termed inebriety, his board being simply a minor incident of the treatment. Neither the county board nor any county officer has authority under any specific statute to contract with a private person or corporation for such treatment and entail a liability therefor upon the county.

Inebriates may, indeed, be received into county asylums under certain restrictions (Stats. 1898, sec. 604*c*), and may be committed to a county poor house (sec. 1513), and the county become liable for their care in whole or in part, but the statutes seem to go no further.

Thus it appears that the legislature has provided certain methods by which inebriety or habitual drunkenness may be dealt with, and we think it plain that by prescribing certain methods it has excluded other methods, and that the general provisions requiring the county or town to care for and relieve paupers refer to necessary food, clothing, ordinary medical treatment, and the like, and not to medical treatment looking toward the cure of inebriety as a disease. There was, therefore, no authority resting in any officer or public body to incur the liability here claimed in the first instance. Such being the case, there can be no ratification by the county. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers. *Frederick v. Douglas Co.* 96 Wis. 411.

By the Court.— Order affirmed.

BARDEEN, J., took no part.

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INTERIOR WOODWORK COMPANY vs. PRASSER, Respondent, and M. HILTY LUMBER COMPANY, imp., Appellant.

December 11, 1900 — January 8, 1901.

Corporations: Ultra vires: *Guaranty: Execution by agent having apparent authority: Building contracts: Liens.*

1. A corporation organized to carry on "a wholesale lumber business and all business incidental thereto" may guaranty the performance of a building contract by a contractor to whom it is furnishing materials for the building, and may agree to save the owners harmless from mechanics' liens, etc.

2. The fact that a contract in the name of a corporation was not executed by the proper officers does not render it void, if the corporation had clothed the agent who executed it with apparent authority so to act. Thus, a guaranty of performance of a building contract, executed in the name of a corporation by an employee whose business was to figure estimates and make sales to contractors, and delivered to an architect to whom the same employee had at other times delivered similar guaranties so executed, of which the corporation had received the benefits and one of which had been witnessed by the vice-president and manager of the corporation, is *held* binding on the corporation.

3. A surety for the performance of a building contract cannot claim a lien on the building for materials furnished to the contractor.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This action was commenced against F. Soltman, as contractor, and *Amalia S. Prasser* and her husband, to foreclose a mechanic's lien against premises owned by *Mrs. Prasser*. The *M. Hilty Lumber Company* also claimed a lien as a subcontractor, and was subsequently brought in as a defendant. To its claim *Mrs. Prasser* made answer, setting up that she made a written contract with the defendant Soltman to furnish material for, and do the necessary work and labor in the erection of, the building upon which the lien was claimed. At the same time said defendant, with one Rohde and the said *M. Hilty Lumber Company*, executed to her a written guaranty that Soltman would faithfully perform his contract, and that said guarantors would indemnify and save the owner harmless from all judgments, mechanics' liens, costs, and expenses by reason of said contract; and claimed that by reason thereof said *Hilty Lumber Company* ought not to be allowed to enforce its said lien. The controversy before us is whether said lien can be enforced or not. The court made findings in favor of *Mrs. Prasser*, and denied the enforcement of such lien. The *Hilty Lumber Company* appeals from this portion of the

judgment which denies its lien and gave *Mrs. Prasser* a judgment for costs.

For the appellant there was a brief by *S. R. Simon*, attorney, and *Nath. Pereles & Sons*, of counsel, and oral argument by *Mr. Simon* and *Mr. C. F. Hunter*.

Julius E. Roehr, for the respondent.

BARDEEN, J. In order to fully understand the matter for decision, a brief statement of the facts and claims of the parties seems necessary. *Mrs. Prasser* was the owner of the property upon which a lien is claimed. On January 25, 1899, her husband, for her, made a written contract with the defendant Soltman to erect a building thereon. One O. C. Uehling was the architect, and represented the owners in securing the contract. At the time the contract was made, Soltman presented to the architect a guaranty under seal, attached to it, signed by John Rohde and the *M. Hilty Lumber Company*, per A. Stange, manager, to the effect that they guaranteed the faithful performance of the contract by Soltman, and would indemnify and save the other party harmless from judgments, mechanics' liens, etc., against said premises. Soltman entered into the performance of said contract, and purchased from the *Hilty Lumber Company* building materials and lumber which were used in the erection of said building of the value of $1,448.91, of which amount $554.11 was still unpaid at the time of the trial. It is for this amount the appellant claims a lien. Upon the trial the *Hilty Lumber Company* claimed that said contract was *ultra vires*, and that Stange was not an officer or member of the company and had no authority to sign such guaranty. To sustain the claim that the guaranty was *ultra vires*, the appellant introduced testimony showing that its business was the "carrying on of a wholesale lumber business, and all business incidental thereto," and the manufacturing and sale of all kinds of lumber and building material.

It also put its articles of incorporation in evidence, which provided that all contracts, etc., should be signed by the president and secretary, and that it was not lawful for any other person or officer to sign such documents.

As regards the question of whether the contract was beyond the power of the corporation to make, we find no especial difficulty. As said in *John V. Farwell Co. v. Wolf*, 96 Wis. 10, "A corporation has only such powers as its organic act, charter, or articles of organization confer. This is elementary, but it includes such powers as are reasonably necessary to effect all the general purposes of the corporate creation, though not particularly specified in its charter, unless prohibited thereby or by some law of the state." Its articles of organization contain no such prohibition. The purpose of the corporation was to wholesale and retail lumber and building materials. As a convenient, but not necessary, means of carrying out that purpose, it might agree to indemnify the owner against loss in cases where it was furnishing the contractor with materials for the building. The scheme was germane to the general purposes of the corporation, and was certainly not against public policy. A case closely parallel in its facts is *Winterfield v. Cream City B. Co.* 96 Wis. 239, and what is there said applies with much force to the case before us. It squarely settles the question against appellant's contention. As noted in many of the cases, courts in recent times have been more liberal in construing the powers of corporations to accomplish the general scope and object of their creation, and the question of *ultra vires* has not been, of late years, construed with that strictness that existed in former times.

What has been said was based upon the assumption that the corporation actually executed the guaranty. The fact that it was not executed by the proper officers of the corporation does not make it void, if in the conduct of its business it had clothed the person who in fact executed it with ap-

parent authority to do so. If a corporation or an individual so conduct their business, either through negligence or otherwise, as to lead the public to believe that the agent possesses authority to contract in the name of the principal, they are bound. Every contract within the scope of the apparent authority of the agent will be enforced if the other party believed and had reason to believe that the agent possessed authority to make it. *McDermott v. Jackson*, 97 Wis. 64. See Thompson, Corp. §§ 4874–4884. The central principle governing this class of cases is whether the principal has allowed the agent, through negligence or otherwise, to possess, in the face of the public, the appearance of such power. If, by reason of such appearances, the making of a contract is induced, the principal will not be heard to say that such power did not in fact exist.

Stange, the person who executed the guaranty in suit on behalf of the corporation, was an employee, and had been such for a number of years. His business was to figure up estimates and make sales to contractors for building jobs. The active managing officer of the corporation was Rudolph A. Hilty, vice-president. Before the guaranty was executed, Soltman had asked for an estimate on the materials required for the *Prasser* job, and which had been entered on the company's books. The officers of the company deny that they had any knowledge of the existence of the guaranty until some time after they had furnished the materials to Soltman. The proof shows, however, that at two different times prior to the execution of the guaranty in suit Stange had executed similar guaranties of other contracts, and delivered them to Mr. Uehling, the architect; one of which had been witnessed by the vice-president of the company. No question as to his authority had ever been raised, and the company seemed to have had the benefits arising therefrom. It is true that Mr. Hilty testifies that he did not know what he was signing, but the surrounding circum-

stances cry out so loudly against that statement that we entirely agree with the trial court in arriving at a contrary conclusion. He was the active manager in charge. Beyond question, the matter of sales to these different contractors, and the conditions under which the company could secure their trade, was considered and talked over. Every circumstance and every probability points in that direction so overwhelmingly that the court was fully warranted in reaching the conclusion stated. Having clothed their agent with apparent authority so to act, as a reasonably prudent man the architect had a right to assume that he had actual authority. To permit the company to dispute it now would be a fraud upon the respondent. See *Ford v. Hill*, 92 Wis. 188; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125; *Hubbard v. Haley*, 96 Wis. 578. Further, the contract having been performed, and the appellant having received the benefits thereof, it cannot now invoke the doctrine of *ultra vires*. *McElroy v. Minn. P. H. Co.* 96 Wis. 317.

The appellant, having become a surety for the contractor, cannot claim a lien for materials furnished him. *Stephens v. Elver*, 101 Wis. 392.

By the Court.— The judgment appealed from is affirmed.

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111	194
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108	562
114	[2]479
108	562
115	661

BARTH, Receiver, Appellant, vs. LOEFFELHOLTZ and another, Respondents.

December 11, 1900 — January 8, 1901.

Attachment of real estate: Waiver: Laches: Concurrent remedies: Judgment: Merger.

1. The rule that the provisional remedy by attachment of real estate, when exercised to the extent of filing a copy of the writ of attachment, with the proper official certificate of the levy indorsed thereon, in the office of the register of deeds of the proper county, will be

deemed waived in case of neglect to seasonably obtain full jurisdiction of the subject of the levy by service of the summons upon the defendant in the action, is limited to the circumstances named.

2. An attachment lien may be lost by laches like any other valuable right. An issue in that regard is one of fact, and the finding in regard to it cannot be disturbed unless against the clear preponderance of the evidence.

3. As a general rule, a person may pursue to judgment as many consistent remedies as he has for the same wrong, but can have but a single satisfaction. That satisfies one judgment directly and indirectly extinguishes all causes of action for the wrong and judgments rendered therefor.

4. The above-stated general rule does not apply where consistent remedies are pursued for the same wrong, there being identity of parties and identity of amount recoverable, such amount reaching a full compensation for such wrong. In such circumstances a judgment in one action is deemed by judicial policy to draw to and merge in it all causes of action so that it may be pleaded in the other actions as a bar to the prosecution thereof.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

Action to remove a cloud on title to real estate. On or about August 7, 1893, defendants commenced an action sounding in tort against John B. Koetting. Such proceedings were duly had therein that on August 8, 1893, the real estate in question was attached and the requisites of the statute to perfect such attachment complied with. Koetting appeared in the action and demanded a copy of the complaint, which was served. The attachment papers were seasonably filed, but the summons and complaint were not filed till after the termination of the action hereafter mentioned challenging the validity of attachments levied prior to defendants' attachment. No answer to the complaint was made by Koetting nor any proceedings taken by him subsequent to the demand and appearance aforesaid. Such proceedings were duly taken in an action commenced against Koetting by plaintiff herein that the real estate in contro-

versy was attached subject to defendants' attachment, August 9, 1893, and such proceedings were thereafter taken that judgment was rendered against Koetting in such action, which was enforced by a sale of all the interest which Koetting had in the attached property at the date of the attachment, and title was perfected in plaintiff pursuant to such sale. Defendants commenced a second action against Koetting and G. C. Trumpff August 30, 1893, for money due upon contract. Judgment was rendered against Koetting and Trumpff in that action September 23, 1893. Nothing was done by defendants in regard to their first action before the commencement of this except what has been related. The subject of such first action was damages caused to defendants by false and fraudulent representations made to them by Koetting regarding the solvency of the South Side Savings Bank, a banking institution in the city of Milwaukee, of which he and Trumpff were the proprietors, whereby defendants were induced to deposit in such bank some over $6,000 in money, resulting in a loss to them of the greater part thereof. The subject of the defendants' second action was the contract liability of Koetting and Trumpff, as partners, to pay to the former the amount of their deposit. The claim of plaintiff in this action was that defendants' attachment lien was lost by their laches or was waived by operation of law.

The trial court found facts as above stated and further found that plaintiff was duly appointed receiver for the South Side Savings Bank in proceedings to wind up its affairs; that he acquired title to the property in controversy in the course of his administration in such winding-up proceedings; that the title thus acquired was subject to defendants' attachment lien acquired August 8, 1893, and that they never abandoned such attachment, nor waived it, nor was it discharged in any manner whatever; that defendants participated in the winding-up proceedings of the bank by pre-

senting the claim which was involved in the second action, the creation of which, under the circumstances, was the ground of the first action; that such claim was allowed and that they received thereon two five per cent. dividends; that the reason of their delay in respect to enforcing the attachment lien was that there were prior attachments on the property for enough to absorb it, if they were held to be valid; that an action was brought by plaintiff to avoid such prior attachments, and that defendants thought best to delay proceeding to enforce their attachment till the final determination of plaintiff's action; that the result of such action was that such prior liens were found to be invalid, in November, 1898. Upon such facts judgment was awarded to defendants and was duly rendered.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *C. F. Fawsett.* They contended, *inter alia*, that the lien of defendants' attachment was lost by their failure to follow up the attachment levy and prosecute the action to judgment with diligence. *Petree v. Bell*, 2 Bush, 58; *Van Loan v. Kline*, 10 Johns. 129; *Cummings v. Tabor*, 61 Wis. 185. The cause of action against Koetting for fraud in procuring the deposits was merged in the judgment recovered against Koetting jointly with Trumpff for the same demand. Freeman, Judgments, §§ 215, 216; Black, Judgments, 729; *Union R. & T. Co. v. Traube*, 59 Mo. 355; 15 Am. & Eng. Ency. of Law, 336; *Bowman v. Purtell*, 15 Jones & S. 403; *Caylus v. N. Y., K. & S. R. Co.* 76 N. Y. 609; *Dyer v. Tilton*, 23 Vt. 318; *Bowen v. Mandeville*, 95 N. Y. 241; *Nicholl v. Mason*, 21 Wend. 339; *Thomas v. Rumsey*, 6 Johns. 26; *Norton v. Doherty*, 3 Gray, 372; *Goodrich v. Yale*, 97 Mass. 17; *Smith v. Way*, 9 Allen, 472; *Eldred v. Bank*, 17 Wall. 547.

Julius E. Roehr, for the respondents, argued, among other things, that the respondents could proceed against Koetting alone on the ground of fraud, or could proceed against Koet-

ting and Trumpff as copartners and hold them liable for money had and received, or they could maintain both actions. The two remedies were consistent and could be pursued simultaneously. 7 Ency. of Pl. & Pr. 362; *New York L. I. Co. v. Chapman*, 118 N. Y. 288; *Morgan v. Skidmore*, 3 Abb. N. C. 92; *Bowen v. Mandeville*, 95 N. Y. 237, 240; *Morgan v. Skidmore*, 55 Barb. 263; *Allaire v. Whitney*, 1 Hill, 484. An election will be compelled only where a judgment in one action would be a bar to a judgment in the other. *Laraussini v. Carquette*, 24 Miss. 151; *Wanzer v. De Baun*, 1 E. D. Smith, 261; *Goldberg v. Dougherty*, 7 Jones & S. 190; *Whitney v. Allaire*, 1 N. Y. 312; *Corn Exchange Ins. Co. v. Babcock*, 8 Abb. Pr. (N. S.), 257; *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 547; *Bishop v. McGillis*, 82 Wis. 120. If the court should decide that the remedies were inconsistent, yet the respondents had and still have the right to enter judgment and proceed in the first action. Where a party has the choice between two inconsistent remedies or causes of action, and he deliberately adopts the one, such election becomes conclusive upon him and precludes him from subsequently adopting another. *Warren v. Landry*, 74 Wis. 151; *Bishop v. McGillis*, 82 Wis. 120, 128; *Franey v. Wauwatosa P. Co.* 99 Wis. 48; *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 547; *Rodermund v. Clark*, 46 N. Y. 354; *Goss v. Mather*, 2 Lans. 283; *S. C.* 46 N. Y. 689; *Linden v. Fritz*, 3 Am. L. J. 421. As soon as the choice is made and one of the alternative remedies proffered by the law adopted, his act at once operates as a bar as regards the other, and the bar is final and absolute. 7 Ency. of Pl. & Pr. 363, and cases cited; *Moller v. Tuska*, 87 N. Y. 166; *Morris v. Rexford*, 18 N. Y. 552; *Kinney v. Kiernan*, 49 N. Y. 164; *Rodermund v. Clark*, 46 N. Y. 354.

MARSHALL, J. It is said the judgment should be reversed because, first, the attachment is void, no proceedings having been taken to enforce it till after the expiration of a reason-

able time therefor; second, the attachment was waived by unreasonable delay; third, the commencement of the second action and prosecution thereof to judgment superseded the first action and necessarily the attachment. We will briefly consider each of such propositions.

1. The first proposition is untenable because the principle upon which it is founded does not apply where full jurisdiction of the property, by service of the summons upon the defendants in some one of the ways authorized by law, has been obtained. *Cummings v. Tabor*, 61 Wis. 185, is relied upon by appellant's counsel. In that case jurisdiction of the property was never obtained for want of service of the summons. The effect of the decision is that a statutory levy upon real estate creates a lien thereon conditionally only, the condition being that full jurisdiction shall be obtained within a reasonable time by service of the summons upon the defendant, and that a delay of one year is too long.

2. The second contention turns on a question of fact. Undoubtedly the possessor of an attachment lien on real property may lose it as he may lose any other valuable right by delay or other conduct indicating an abandonment of it, which is reasonably relied upon by another so that such other will be prejudiced if such person be allowed to change his position. The case was tried on that theory. The legal principles indicated were correctly applied to the facts found. The difficulty as regards appellant's position then was that the facts were found against him, and the difficulty of giving effect to the contention of appellant's counsel now is that the evidence supports the findings. Such findings, and the evidence as well, are to the effect that defendants never intended to abandon the attachment lien; that they had good reason for the delay in the enforcement thereof; that plaintiff well knew such reason during the period of delay; and that such delay did not, of itself, operate to plaintiff's prejudice.

3. The last of counsel's propositions is based on the doctrine of merger, though in the argument, and more particularly the cases cited to support it, such doctrine seems to be confused with, instead of being recognized as an exception to, as it is in fact, the rule that one person may pursue to judgment as many remedies as he has for the same loss, if they are not inconsistent, but can have only one satisfaction; payment of one of the claims involved in the enforcement of such remedies, whether made before or after judgment, being considered a *pro tanto* discharge of the claim involved in the other. *Sherman v. Brett*, 7 Wis. 139; Freeman, Judgments, § 222; *Morgan v. Skidmore*, 55 Barb. 263; *Bowen v. Mandeville*, 95 N. Y. 237; *Vail v. Reynolds*, 118 N. Y. 297.

The test to be applied in order to determine the applicability of the rule last stated is to determine whether the state of facts necessary to support one remedy can coincide with the facts necessary to support the other. Freeman, Judgments, § 222, and cases cited; *Rice v. King*, 7 Johns. 19; *Bowen v. Mandeville*, *supra*. If the answer to the inquiry in that regard be in the affirmative, then both remedies are concurrently available unless the situation fall within the exception stated, the doctrine of merger. A good illustration of inconsistent remedies is where a person may sue for conversion or waive the tort and sue on an implied contract to recover the reasonable value of the property. Another is where a person may sue on contract or rescind the contract and sue to recover the property that passed under it. In such cases the assertion of one remedy constitutes an election to rely thereon and precludes resorting to the other. *Warren v. Landry*, 74 Wis. 144; *Crook v. First Nat. Bank*, 83 Wis. 31; *Bank of Lodi v. Washburn E. L. & P. Co.* 98 Wis. 547; *Carroll v. Fethers*, 102 Wis. 436.

As good an illustration as can be found in the books of the situation where the doctrine of merger applies is *Caylus v. N. Y., K. & S. R. Co.* 76 N. Y. 609. It is the only case

cited, to support that phase of such doctrine here under consideration, in Freeman on Judgments and Black on Judgments. The situation there presented was this: After recovering judgment against the debtor for the full amount due for goods sold on credit, a second action was commenced against him for damages for fraudulently inducing plaintiff to make the sale. The decision was to the effect that, the parties in both actions being identical, and the first judgment being for the full amount plaintiff could in any event recover, it was in the power of the court to treat all consistent remedies to effect such recovery as merged in the one adopted. The limitation of the exception to the general rule, clearly indicated in that case, is that where identity of parties coupled with the circumstance of a judgment covering the entire claim does not exist, the doctrine of merger does not apply. These distinguishing characteristics had that effect in *Bowen v. Mandeville*, 95 N. Y. 237, where, after recovering several but not all of the instalments due upon a bond, an action was sustained in the same right against the same defendant for deceit in inducing the creditor to take the bond, the court saying, in substance: 'A party may prosecute as many remedies as he legally has, provided they are consistent and concurrent. The record here does not show any attempt to rescind the contract, consequently the several remedies prosecuted must be considered consistent and maintainable if founded upon existing causes of action. This action is not inconsistent with those heretofore brought and prosecuted to judgment. Only part of the debt was included in such actions. All of the actions proceeded on the theory of an affirmance of the contract of sale. They differ in form, but one does not allege what the other denies. They are consistent, though not identical. A recovery in one does not constitute a bar to a recovery in the other. One proceeds upon the theory of a tort and the other upon contract, and the theory upon which

damages are awarded is different in the two cases. If we apply the test as to whether the same evidence is required in both actions, it would be seen that they are not the same. In one case the recovery is based upon contract liability; in the other the liability incurred grows out of a violation of the duty of honesty and fair dealing. It is true that it may turn out that the damage recoverable is the same in one action as in the other, but that would be merely an accidental coincidence and would not affect the general rule upon which the actions are distinguished. The party injured can, however, recover only in one suit for the damages suffered, no matter how many actions he may be entitled to prosecute for that recovery. A different question would be presented had the plaintiff recovered judgment for the entire contract liability in the first action. Such judgment would have covered the entire damage *and it would then have been within the power of the court to limit the plaintiff's remedy to such redress as would be obtainable in such action.*'

The limit of the exception is still better illustrated by *N. Y. L. I. Co. v. Chapman*, 118 N. Y. 288, where a landlord, after recovering a judgment against two persons as partners for the full amount of the rent due upon the lease, which judgment was not collectible by reason of their insolvency, was sustained in the prosecution of a second action against one of the partners for damages for deceit in procuring the lease. The same contention was made by defendant as we have here, and it was answered by the court in substance as follows: 'The doctrine that any action in affirmance of a contract after discovering the fraud defeats the right of rescission is not necessarily applicable to an action founded on fraud. The recovery of judgment against the lessees for the full amount of the rent might be held binding on the lessor the same as an election of remedies if all the lessees had been chargeable with fraud, which is the gravamen of the

second action, as in that case their liability would have been merged in the judgment, embracing, as it would, the entire amount of rent for which they became liable upon the lease. But while the liability of the lessees was joint, the liability of the defendant for fraud is single and collateral. The remedy against him on that liability is not inconsistent with the liability against the firm on the lease, as both remedies proceed on an affirmance of the lease. The cause of action for the fraud being single, collateral, and distinct, as indicated, it was not merged in the recovery against the guilty party and his partner on the lease.'

It will be seen that the doctrine of merger was held not to apply in one of the above-cited cases, because the first action did not cover the entire amount of damages involved; that it was held not to apply in the second action referred to because the parties were not identical, nor the nature of the liability; and that the general rule, that concurrent consistent remedies may be pursued to judgment for the same loss, was held to apply to both cases, because there was no fact necessary to the availability of one remedy displaced by any fact necessary to the availability of the other.

From the foregoing we may deduce this conclusion: The doctrine of merger applies only where the situation is the reverse of that which is ruled by the law as regards the election of remedies, though the legal effect is the same, i. e., to confine the plaintiff to a single remedy. In the latter situation the remedies are always inconsistent; in the former always consistent. In the latter there can be but one remedy resorted to though there be several at the start, because, while each of them stands for a specific right, the several rights are alternatives. In the former, one can have but the single remedy, because, though there are several remedies standing for concurrent rights in form, the enforcement of one reasonably covering the entire field, by a rule of judicial policy, draws to it and absorbs the others, such policy being

a species of equitable interference with legal remedies where they are uselessly multiplied. Where complete identity of parties does not exist and inclusion in some form of the entire damage in the first action, but there are consistent rights with appropriate remedies, each covering a part or all of the subject of the wrong, the possessor thereof is absolutely entitled to judicial machinery to enforce them all up to the point of a single and complete satisfaction, when all run into one and are extinguished by such satisfaction.

It would seem that the conclusion that must follow from the foregoing is plain. Identity of parties in the two actions commenced by defendants does not exist. The charge of fraud was against Koetting alone. Both actions recognized the relation of debtor and creditor between defendants and Koetting and Trumpff. Neither repudiates or is inconsistent with the contract between such parties. The remedies pursued in the two actions are perfectly consistent. Koetting could not plead the judgment in the second action in bar as a defense to the first. The general rule and not the exception, the doctrine of merger contended for by appellant's counsel, applies.

By the Court.—The judgment is affirmed.

BARDEEN, J., took no part.

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108 572
111 [3]560

108 572
116 [3]507

PFISTER, Respondent, vs. THE SENTINEL COMPANY and others, Appellants.

December 12, 1900 — January 8, 1901.

Libel: Newspaper publication: Report of "public official proceedings:" Charge of bribery: Liability of officers of corporation.

1. A newspaper publication stating that "there is a general supposition that" plaintiff and another "have, by means of their wealth and political power, obtained absolute control of the mayor and a ma-

jority of the councilmen" of a city, that "the officers thus directly or indirectly bought are held in much public contempt," but "the men who did the buying have in no wise lost caste," and plaintiff continues to be an honorable leader in social circles — is not a report of any "public official proceeding," within the meaning of sec. 4256*a*, Stats. 1898, and is libelous *per se*.

2. Officers, stockholders, or members of a publishing corporation are not liable for a libelous publication simply because of official position or membership; but if they in any way aided, assisted, or advised its publication or circulation, or their duties as officers or agents were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that such officers or agents knew or ought to have known of the publication, they are liable and cannot defend on the ground merely that they did not know about the libel until after it was published.

3. In an action for libel the complaint, liberally construed, charged that certain defendants, who constituted a majority of the directors of a newspaper corporation, had caused the corporation, through its newspaper, to adopt a policy of bitter opposition to a proposed ordinance relating to a street railway company; that in following out this policy they had caused violent and inflammatory articles to be published defamatory of the plaintiff and insinuating that he was guilty of criminal and unlawful methods in attempting to secure the passage of the ordinance, and had been guilty of bribery; and that in further continuance thereof they caused the false and defamatory matter in question to be published and circulated. *Held*, that a cause of action was stated against said directors. *Simonsen v. Herold Co.* 61 Wis. 626, distinguished.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

Action to recover damages for libel. The following is a summary of the complaint:

The defendant the *Sentinel Company* is a corporation, and at the times hereinafter stated was the proprietor and publisher of a daily newspaper called the "Milwaukee Sentinel." The defendant *Myrick* was its editor in chief, and had the active management and control of the publication of said newspaper. The defendants *Tweedy*, *Ilsley*, and *Rublee* were

directors of said corporation, and constituted a majority of said board. The plaintiff is a resident of Milwaukee, and a director in a corporation known as the Milwaukee Electric Railway & Light Company. On December 26, 1899, and for some months prior thereto, there had been pending before the common council of Milwaukee an ordinance authorizing said street railway company to construct and operate street railways over certain streets, providing for the rates of fare to be charged, and for the termination of all franchises theretofore granted to it or its successors or assigns. During the pendency of the ordinance the subject matter thereof had excited general interest, and had caused great public discussion in the newspapers and among the people, and concerning which there was considerable diversity of opinion. During this time it is claimed that the defendant *Myrick* and the said directors had caused the *Sentinel Company*, in its newspaper, to continuously oppose the adoption of said ordinance, and had caused to be published therein many violent and inflammatory articles opposing the adoption of said ordinance, and impugning the motives of the majority of the members of said council who supported the same, and insinuating that the plaintiff, with others, had secured, and were securing, and were seeking to secure, the votes of a majority of said council in favor of said ordinance by bribery and the use of other criminal and unlawful methods and influences; that at all of said times said defendants had maliciously pursued the plaintiff with insinuations of criminal acts and attempts in the premises, and maliciously and with intent to defame the plaintiff from day to day had caused to be published in said newspaper articles containing veiled insinuations that he was guilty of the crime of bribery in securing votes for said ordinance.

The sixth subdivision of the complaint is as follows:

"That on the 26th day of December, A. D. 1899, the defendant the *Sentinel Company*, as the publisher of said news-

paper, and the said defendant *Myrick*, as managing editor thereof, and the said defendants *Ilsley*, *Tweedy*, and *Rublee*, as the majority of the board of directors of the said corporation, who directed and controlled and were then controlling its policy, with the intent to defame and injure the plaintiff in his good name and reputation, published, printed, uttered, and circulated in the said newspaper, the Milwaukee Sentinel, throughout the city and county of Milwaukee and the state of Wisconsin, of and concerning this plaintiff, the false and defamatory matter following, namely:

"'People naturally attack the franchise (meaning thereby the said ordinance), and their fire was drawn by the flagrant clause, "The fare shall be five cents." When the ordinance (meaning the said ordinance) came up for amendment last Monday (meaning the said 18th day of December, 1899), the company (meaning the said The Milwaukee Electric Railway & Light Company) made a concession. An amendment was accepted, reading, "The fare shall not exceed five cents." Then the conspirators (meaning and insinuating thereby that this plaintiff and one Henry C. Payne had conspired with others to improperly and illegally secure the passage of said ordinance) overlooked a point. In deference to a public sense of decency, they failed to call a midnight meeting for the final passage of the measure, but called a special meeting for next week.

"'Opponents of the franchise (meaning thereby the said ordinance) have taken advantage of the breathing spell, and Wednesday night obtained a temporary injunction, on the ground of conspiracy between Payne (meaning thereby the said Henry C. Payne) and *Pfister* (meaning thereby the plaintiff), chief owners of the company (meaning thereby the said The Milwaukee Electric Railway & Light Company), on one side, and the mayor and twenty-five members of the council on the other (meaning thereby the mayor of the city of Milwaukee and the said twenty-five aldermen who

voted in favor of the said ordinance), to defraud the city by granting a valuable franchise without adequate return to the city (meaning thereby to charge and insinuate that this plaintiff and said Payne had conspired with the said mayor and twenty-five aldermen to perpetrate a fraud upon the said city of Milwaukee). The people base their hope for relief upon a recent dictum of the Wisconsin supreme court which declares that it would not be tied down by precedent in the effort to right a wrong wherever found.

"'There is a general supposition that Messrs. Payne (meaning thereby the said Henry C. Payne) and *Pfister* (meaning thereby this plaintiff) have, by means of their wealth and political power, obtained absolute control of the mayor and majority of the councilmen (meaning thereby the said mayor and the said aldermen), and the officers thus directly or indirectly bought are held in much public contempt (meaning and insinuating thereby that this plaintiff and the said Henry C. Payne had bribed the said mayor and the said twenty-five aldermen to vote for the said ordinance). In the meantime, in full accordance with our peculiar moral standards, the men (meaning thereby this plaintiff and the said Henry C. Payne) who did the buying (meaning thereby bribing the said aldermen and so corruptly influencing them in their official acts) have in no wise lost caste. Mr. Payne is looked up to in national political affairs, and *Mr. Pfister* (meaning thereby this plaintiff) continues to be an honorable leader in Milwaukee social circles.'

"And this plaintiff alleges that the said defendants published the said article of and concerning this plaintiff, and intended thereby to charge, and did thereby charge, that this plaintiff had corruptly given, offered, or promised to the said mayor and aldermen gifts or gratuities, money or things of value, or pecuniary or personal advantages, with intent to influence their votes, opinions, judgment, and actions upon the matter of the said ordinance which was then pending

before them in their official capacity, contrary to the statute of the state of Wisconsin, and in violation of the criminal code of said state.

"And this plaintiff alleges that thereupon, on the said 26th day of December, 1899, the said defendants procured to be distributed and circulated throughout the city and county of Milwaukee and state of Wisconsin and other states many thousand copies of the said newspaper containing the said defamatory matter."

The defendants jointly and severally demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants have appealed.

For the appellants the cause was submitted on briefs by *Van Dyke & Van Dyke & Carter*, attorneys, and *W. H. Timlin*, of counsel. They contended, *inter alia*, that the directors as such cannot be held liable for a tort of the managers. *Stone v. Cartwright*, 6 Term, 411; *Hewett v. Swift*, 3 Allen, 420; *Bath v. Caton*, 37 Mich. 199; *Bacheller v. Pinkham*, 68 Me. 253; *Weir v. Barnett*, 3 Exch. Div. 32; *Weir v. Bell*, id. 238; *Arthur v. Griswold*, 55 N. Y. 400; 3 Thomp. Corp. § 4097; *Fanning v. Osborne*, 102 N. Y. 441–448; *Simonsen v. Herold Co.* 61 Wis. 628; *Smith v. Utley*, 92 Wis. 136; *Dabold v. Chronicle P. Co.* 107 Wis. 357.

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *Charles Quarles*.

BARDEEN, J. The first ground upon which it is sought to reverse the order appealed from is that the complaint shows upon its face that the publication in question was a newspaper report of a "judicial, legislative, or other public official proceeding authorized by law, and of some public statements in the course of such proceeding," and as such privileged under sec. 4256*a*, Stats. 1898. That section reads as follows: "The proprietor, publisher, editor, writer or reporter upon

any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law, or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any head line or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person. Any true statement, explanation, correction or retraction published without comment in any such newspaper within a reasonable time after any publication in violation of this section, or after the publication of any libelous matter, or in the next issue after notice of such publication, may be introduced upon the trial of any such action as a sufficient defense against any imputation of malice and against the recovery of any damages except actual damages."

Neither the scope nor constitutionality of this law is argued by the appellants. It is simply asserted that the matter published comes within the purview of the law, and the argument presented is in support of that view. If this argument is well founded, then the question suggested would properly be for consideration; if not, then the alleged libelous article must be considered, tested, and disposed of under the settled rules of law governing such matters.

We find no difficulty in the determination of this point. The chief reason urged by appellants in support of their position is that it nowhere appears in the complaint "that the report in question is not a true or is not a fair report of this public official proceeding." The difficulty with this contention is that the article in question is not, and does not pur-

port to be, a report of any such proceeding. On the contrary, after reciting that an injunction had been obtained on the ground of a conspiracy between Payne and *Pfister*, it charges that they have, by means of their wealth and political power, obtained absolute control of the mayor and a majority of the councilmen, and that the men who did the buying have in no wise lost caste; that Mr. Payne is looked up to in national affairs, and *Mr. Pfister* continues to be a leader in social circles. By what process of reasoning can it be said that this is a "true and fair report," or any report at all, of a judicial or other public official proceeding, or of any speech, argument, or debate in the course of such proceeding? Beyond the recitation that an injunction had been secured, there is nothing in the article that approaches the semblance of a report. The substance of the publication is plainly the opinion of the writer, couched in language easily understood and certain of intent. As stated in the opinion of the trial judge: "Here is a direct charge of bribery involving the plaintiff as one of the bribers; a strong charge to the effect that the moral sense of the community has fallen very low, because the plaintiff, and the others charged with him, appear without loss of caste in Milwaukee, and are leaders in political and social circles." The matter printed involves the conclusions and deductions of the writer, is clearly libelous *per se*, and from its very nature could not have been, and cannot by the most generous latitude of construction be construed to be, a report of a judicial or other public official proceeding. We think it sufficiently appears from the complaint that the imputations of bribery and corruption were distinctly the product of the defendants, and are of such a nature, when the whole article is considered, as not to come within the purview of the statute under the broadest or most liberal interpretation possible. If the validity of the statute be admitted, a publication, to be privileged, must have been made in good faith, must be a true

and impartial report of the matter involved, and without exaggeration or the introduction of irrelevant defamatory matter. The publication in question is very far from the line suggested, and hence the ruling of the trial court on this branch was amply justified. See *Buckstaff v. Hicks*, 94 Wis. 34.

2. The second ground of error is based upon the claim that the complaint does not state a cause of action as against the defendants *Ilsley*, *Tweedy*, and *Rublee*, who were directors of the defendant corporation. We have held that the publication in question was libelous, and therefore actionable. All persons engaged in publishing and circulating a libel are responsible therefor, and may be proceeded against either jointly or severally. Newell, Slander & L. 240; *Belo v. Fuller*, 84 Tex. 450; *Smith v. Utley*, 92 Wis. 133. Officers, stockholders, or members of a publishing corporation are not liable for a libelous publication simply because of official position or membership, unless they come within one of the exceptions hereinafter named. Their liability, if any, springs from their active agency in producing and circulating the libel. But if it be shown that they in any way aided, assisted, or advised its publication or circulation, or that their duties as officers or agents of the concern were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that such officers or agents knew or ought to have known of the publication, they are liable, and cannot defend on the ground merely that they did not know about the libel until after it was published. This was distinctly held in *Smith v. Utley*, 92 Wis. 133, and the cases and text-books sustaining the proposition are there cited.

It is elementary law, as applied to code pleadings, that a complaint will not be overthrown on demurrer unless it is wholly insufficient. Every reasonable intendment is to be

made in its favor. *Morse v. Gilman*, 16 Wis. 504; *Miller v. Bayer*, 94 Wis. 123; *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436; *Miles v. Mut. R. F. L. Asso.*, *ante*, p. 421. In pursuance of this rule, and by aid of the statute (sec. 2668, Stats. 1898), "if the essential facts can be gathered from the pleading, or may reasonably be inferred from its allegations, it is good, though such allegations be in form uncertain, incomplete, and defective." See *Flanders v. Mc Vickar*, 7 Wis. 372; *Horn v. Ludington*, 28 Wis. 81; *Merrill v. Merrill*, 53 Wis. 522. A narrow rule seems to have been indicated in *Simonsen v. Herold Co.* 61 Wis. 626, in testing a complaint somewhat similar to the one in question. There the allegation was that the defendant Colman "was and is the principal proprietor of said Herold Company, and interested in, and proprietor and manager of, said newspaper." In the decision it was said, "The averment that he is manager of the newspaper does not *necessarily* import that he controls its columns." The real question at issue was whether it might *reasonably* have been inferred from all the allegations of the complaint that he had such control, and not whether any particular allegation *necessarily* imported such a conclusion.

The real question, therefore, is whether, by a fair and reasonable construction of all of its allegations, the complaint charges that these defendants caused this publication merely in the sense that they carried on the business affairs of the corporation, or whether, as such officers, they had adopted a policy for the corporation in opposition to the street-railway ordinance, and of abuse and defamation of plaintiff, and whether it may be reasonably inferred therefrom that the publication in question was made in consonance with and pursuant to the policy so adopted, so that it can be said their action comes within the rule of law stated. It is not claimed that the complaint shows that the directors, as such, were charged with duties with reference to the publication

and circulation of the newspaper from which the law would imply knowledge, and consequent liability for the publication of a libel, by virtue of mere official position. The complaint does not by positive allegation charge that the directors advised or counseled this specific libel. It does allege, however, that, during the pendency of said ordinance, *Myrick*, as managing editor, and the other defendants, as the majority of the board of directors, had caused the corporation, in its newspaper, to continuously oppose the adoption of said ordinance, and had caused the publication of many violent and inflammatory articles in opposition thereto, impugning the motives of the members of the council who favored the same, and insinuating that the plaintiff was seeking to secure votes therefor by bribery and other criminal and unlawful methods and influences, and had maliciously pursued the plaintiff with insinuations of criminal acts, and caused to be published in the said newspaper veiled insinuations that the plaintiff was guilty of bribery. A natural, and we may say a necessary, inference from these allegations is that the corporation, under direction of said defendants, had adopted a distinct line of policy in opposition to the ordinance and condemnatory of the plaintiff. Then follow the allegations quoted in the statement. While not stated in so many words, the inference follows as naturally and reasonably as though so stated that the libelous publication was made in pursuance of the policy theretofore adopted by said directors.

Construing the complaint with that liberality which the law demands, and indulging in every reasonable intendment to support it, we reach this conclusion: The defendants, who constitute the majority of the board of directors, had caused the corporation, through its newspaper, to adopt a policy of bitter opposition to the adoption of the proposed ordinance; that in following out this line of policy they had caused violent and inflammatory articles to be published

defamatory of the plaintiff and insinuating that he was guilty of criminal and unlawful methods in attempting to secure its passage, and had been guilty of bribery; that in further continuance thereof they caused the false and defamatory matter mentioned to be published and circulated. Their liability, if any, must rest upon the fact that they have, by their official action as directors, caused the corporation to adopt a slanderous policy towards plaintiff, which resulted in the publication and circulation of the alleged libel. It may be that the proof will fall short of the allegation. With that we have no concern. We deal only with the allegations of the complaint and the natural and reasonable inferences arising therefrom. Considering such allegations, and indulging such inferences, we conclude that sufficient appears in the complaint to bring the defendants within the rule of responsibility before mentioned.

It is in the respect heretofore suggested that the complaint herein differs from that in *Simonsen v. Herold Co.* 61 Wis. 626, and is, therefore, distinguishable from it. It is not to be understood that such directors are responsible merely because they have, by official action, caused the corporation to adopt a policy of opposition to the ordinance and critical of plaintiff. Such policy must be shown to be one of vilification and libel, and it must appear that the publication in question was made pursuant thereto, or that they actually advised or counseled this specific act; else they cannot be held liable.

By the Court.— The order appealed from is affirmed.

NORTHERN ELECTRICAL MANUFACTURING COMPANY, Appellant, vs. THE J. C. WAGNER COMPANY, Respondent.

December 12, 1900—January 8, 1901.

Sale of chattels: Consignment for sale: Agency: Evidence.

1. If a consignee of goods is at liberty, under the contract between him and the consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price, their relation is not that of principal and agent, and the consignor cannot maintain an action against the purchaser for the price.
2. A consignee may, by the terms of his agreement, be the agent of the consignor until the consigned goods are sold, and when they are sold become, as between him and the consignor, the purchaser of, and principal debtor for, the goods.
3. Where, in an action by the consignor against a purchaser from the consignee, defendant claimed that at the time of his purchase the consignee was not an agent but a vendee of the plaintiff, evidence that prior to the action the plaintiff exacted payment from the consignee and drew upon the latter for the price is admissible.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Affirmed.*

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *E. P. Vilas.*

For the respondent there was a brief by *Nath. Pereles & Sons*, and oral argument by *G. D. Goff.*

CASSODAY, C. J. The complaint alleges, in effect, that the plaintiff is a corporation existing under the laws of this state, engaged in the manufacture and sale of electrical apparatus and machinery, having its principal place of business at Madison, and that the defendant is a corporation existing under the laws of this state, having its principal place of business at Milwaukee; that this action is brought to recover $145, as the agreed price of one eight horse power motor, furnished, sold, and delivered by the plaintiff to the defend-

ant at Milwaukee July 15, 1898, which sum the defendant then and there promised and agreed to pay to the plaintiff, and which it had failed to do, though often requested. The defendant answered by way of admissions and denials. At the close of the trial of such issues the jury returned a verdict in favor of the defendant. From the judgment entered thereon accordingly the plaintiff brings this appeal.

Error is assigned because the court refused to direct a verdict in favor of the plaintiff for $130, or to set aside the verdict and grant a new trial. This is based upon the theory that the motor was the property of the plaintiff up to the moment when it was sold to the defendant by Julius Andrae & Sons Company, acting only as agent of the plaintiff, and liable to account to it only in that capacity. In other words, it is claimed that the verdict is not supported by the evidence.

It appears from the record, and is undisputed, that September 3, 1897, the plaintiff entered into a written contract with Julius Andrae & Sons Company whereby, in effect, the latter company was appointed and constituted the plaintiff's sole and exclusive agent for the sale of its electric generators and motors in Milwaukee for the term of three years, unless sooner terminated as therein provided; that in making such sales the Andrae Company was to have a commission as therein stated; that all proceeds of such sales were to be immediately transmitted to the plaintiff, and, when completed by final payment, the Andrae Company was to be credited with the amount of their commissions and compensation, as therein provided; that such contract provided that it might be terminated by either party thereto upon sixty days' prior written notice. There is testimony on the part of the plaintiff to the effect that in the latter part of March, 1898, or in April of that year, the plaintiff gave such written notice for such termination of the contract, and that such sixty days expired a short time prior to July 15, 1898. It is in evidence and undisputed that on March 10, 1898, and

prior to the service of such notice, the plaintiff consigned to the Andrae Company three secondhand motors, including the one in question, and thereupon sent to that company a statement of such consignment, giving the price of each motor, as follows, to wit:

Northern Electrical Manufacturing Company.

Madison, Wis., March 10, '98.

J. Andrae & Sons Co., Milwaukee, Wis.:

To 1	6 H. P. 2,202	motor.	secondhand	.....	$100
1	8 H. P. 2,202	"	"	.....	130
1	15 H. P. 2,202	"	"	.....	210
					$440

On consignment. Entered.

There is evidence on the part of the defendant to the effect that the first secondhand motor so named on the bill of consignment to the Andrae Company at the stated price of $100 was sold by that company April 4, 1898, for $130, and thereupon it settled with the plaintiff therefor by paying $100, and also that the third secondhand motor so named on such bill of consignment to the Andrae Company at the stated price of $210 was sold by that company April 19, 1898, for $225; that the other secondhand motor so named on such bill of consignment to the Andrae Company at the stated price of $130 was sold July 15, 1898, by that company to the defendant herein for $145, which is just the amount claimed by the plaintiff in its complaint; that a few minutes after such sale the vice-president of the Andrae Company informed the secretary of the plaintiff that he had sold that motor to the defendant herein, and that the secretary replied: "That is good. I will notify our folks at Madison to take it off the consignment and put it on the general account,"—and that the vice-president of the Andrae Company acquiesced; that prior to the time when the plaintiff made such consignment, March 10, 1898, the secretary of the plaintiff was in the store of the Andrae Company, and

told its vice-president that the plaintiff had three motors which it could not sell in Madison, that they were made by its predecessors and were not standard, that they were secondhand and out of date, that the Andrae Company could sell much more readily in Milwaukee than the plaintiff, and that he would send them to the Andrae Company on consignment,—and did in a few days afterwards, but did not state the price at which it would sell them, nor the price he would require the Andrae Company to sell them at; that he said the Andrae Company could sell them at any price it pleased; that, upon the receipt of the bill of consignment quoted, the Andrae Company knew from that what they would cost it.

On July 15, 1898, and after such sale to the defendant, the Andrae Company wrote to the plaintiff to the effect that it had that day sold and delivered to its customer the secondhand motor which the plaintiff charged to it at $130 on consignment account March 10, 1898. That letter was received by the plaintiff July 16, 1898. On the same day the plaintiff wrote to the defendant, insisting that that motor must be settled for directly with the plaintiff; that the Andrae Company never had any license to sell for the plaintiff except on written contract; and that in selling the motor in question it had gone outside of its former arrangement. To that letter the defendant replied to the effect that the purchase was made by it from the Andrae Company, and that the defendant could not recognize the plaintiff in the deal at all.

It is undisputed that the sale was actually made to the defendant by the Andrae Company. It is true that the plaintiff's secretary was at the Andrae Company's place of business July 15, 1898, for the purpose of removing all unsold machinery belonging to the plaintiff, including the motor in question; but it is conceded that when he was informed by the Andrae Company that it probably had a cus-

tomer for that motor he consented that it might make the sale, and, presumably, in the absence of anything appearing to the contrary, on the same terms that the other two secondhand motors had been sold. In support of the verdict such evidence must be construed as favorably to the defendant as it will legitimately bear. Such evidence, so construed, is sufficient to bring the case within the rule stated in *Ex parte White*, 6 Ch. App. 403, where it is said that if an agent "sells at the price at which he is authorized by his principal to sell, and upon the credit which he is authorized by his principal to give, and the customer pays him according to his contract, then, no doubt, he is bound, like any other agent, as soon as he receives the money, to hand it over to the principal. But if the consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes, and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time,— whatever the parties may think,— their relation is not that of principal and agent." That case was affirmed in the House of Lords, *Towle & Co. v. White*, 21 Weekly Rep. 465. See, also, *Nutter v. Wheeler*, 2 Lowell, 346, and cases there cited; Benj. Sales (7th ed.), 7, and cases there cited. We must hold that the verdict is sustained by the evidence.

Exception is taken because, after charging the jury to the effect that, if they found that the Andrae Company made the sale as the mere agent or factor of the plaintiff, then they must find for the plaintiff, the court further charged the jury as follows: "But if you determine from all the credible evidence in the case that the Julius Andrae Sons Company was in fact a purchaser, and became liable for the price of the motor when sold, as a principal debtor, then your verdict in the case should be for the defendant. A consignee may, by the terms of his agreement, be the agent of the consignor until the consigned goods are sold, and

when sold become, as between him and the consignor, the purchaser of, and principal debtor for, the goods sold." We perceive no error in such portions of the charge. In our judgment, the evidence mentioned justified such instructions. We perceive no error in admitting evidence tending to prove that prior to the commencement of this action the plaintiff exacted payment from the Andrae Company, and drew on it for the price, named in the consignment, of the motor in question. Such evidence was in the nature of admissions. We find no reversible error in the record.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

BARDEEN, J., took no part.

DUMMER, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

108 589
112 230

108 589
115 206

December 12, 1900—January 8, 1901.

Street railways: Injury to person crossing track: Failure to look for approaching car: Court and jury: Instructions: Special verdict: Setting aside findings: Judgment: Appeal.

1. Plaintiff was injured while crossing the tracks of defendant's electric street railway by a car striking the wagon on which he was riding. It was admitted on the trial and found in the special verdict that neither he nor the driver of the wagon looked in that direction to see whether a car was approaching, before starting to cross the track. *Held*, as matter of law, that he was guilty of contributory negligence, notwithstanding a finding of the jury to the contrary.
2. It was error, in such case, to instruct the jury that, even if neither plaintiff nor the driver looked, still they were not guilty of contributory negligence if a person exercising ordinary care who had looked would have considered it safe to cross the track because the car was so far away.

3. The rule that if plaintiff was placed in a situation of danger by defendant's negligence, and was compelled to choose one of several lines of action in the presence of imminent danger, the fact that he did not choose the best means of escape does not charge him with negligence, is not applicable to a case where plaintiff, by his own negligence, had placed himself in the position of danger.
4. Where no motion was made in the trial court to strike out findings in the special verdict which were contrary to the undisputed evidence, and for judgment on the verdict, this court will not direct judgment but will order a new trial.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an action for personal injuries. The facts shown in the evidence were as follows:

State street, in the city of Milwaukee, is a public highway running east and west, upon which the defendant company operates double railway tracks, the cars being propelled by electricity. The roadway of the street is about forty feet wide between the curbstones, the car tracks being in the center of the street, and there being a distance of about thirteen feet from the outside track to the curbstone upon each side. Thirteenth and Fourteenth streets are north and south streets, which cross State street at right angles and one block apart. Between Thirteenth and Fourteenth streets there is also an eighteen-foot alley running north and south and crossing State street at right angles. The center of the alley is 166 feet west of Thirteenth street.

On the 28th of May, 1898, the plaintiff, a man aged thirty-eight years, was riding on a wagon loaded with two large sticks of timber forty feet long; the wagon being drawn by one horse, and the front and rear axles thereof being about twenty-six feet apart. The plaintiff sat on one of the timbers about two feet forward from the hind axle; and the driver, one Jacob Freuh, sat upon the front part of the wagon. In this condition the teamster drove south on Thirteenth street to State street, and then turned west on

State street, and drove on the south side of the railway tracks. His purpose was to enter the alley between Thirteenth and Fourteenth streets on the north side of State street. As the teamster approached the alley, they saw a car approaching from the west on the south track of State street, and the teamster stopped, and waited, and let the car pass. Immediately after the passage of the eastbound car, he turned his horse north, making a semicircle, in order to drive into the alley, and the horse proceeded at the usual gait across both lines of railway track, and was about to enter the alley, when one of the defendant's cars coming from the east ran into the wagon about twenty-three feet from the front end of the timber, turning the wagon over, and shoving it ten feet or so west, and injuring the plaintiff. The accident happened at noon, and the rails of the railway track were dry. The negligence claimed by the plaintiff was the excessive speed of the car and that no warning was given by the motorman.

The jury rendered the following special verdict: "(1) Was plaintiff injured on May 28, 1898, on State street, between Thirteenth and Fourteenth streets, by a collision between the wagon he was riding upon and one of the defendant's cars? *By the Court:* Yes. (2) Was the motorman of defendant's car guilty of a want of ordinary care which proximately caused plaintiff's injury? Yes. (3) Did the teamster, Jacob Freuh, look to the east, to ascertain whether or not a car was approaching, before driving north upon defendant's tracks? *By the Court:* No. (4) Did plaintiff look to the east for an approaching car before starting north across defendant's tracks? *By the Court:* No. (5) Was the teamster, Jacob Freuh, guilty of a want of ordinary care which proximately contributed to the injury? No. (6) Was the plaintiff guilty of a want of ordinary care which proximately contributed to the injury? No. (7) If the court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess his damages? $3,733."

The court rendered judgment for the plaintiff upon this verdict, and the defendant appeals.

For the appellant there was a brief by *Spooner, Rosecrantz & Spooner*, and oral argument by *C. M. Rosecrantz.*

For the respondent there was a brief by *O'Connor, Hammel & Schmitz*, and oral argument by *A. J. Schmitz.*

WINSLOW, J. Whatever difference of opinion there may be upon the subject as an original proposition, it is now firmly settled as a part of the law of this state that it is the duty of a person approaching the track of an electric street railway, whether he be walking or riding in a vehicle, to look and listen for approaching cars; and that if he fails to do so, and is injured by a car while crossing the track, he is guilty of contributory negligence as matter of law. *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Ryan v. La Crosse City R. Co.*, *ante*, p. 122; *Wills v. Ashland L., P. & S. R. Co.*, *ante*, p. 255. This conclusion seems also to have the weight of judicial opinion in other states in its favor. Booth, St. Ry. Law, §§ 312, 315.

This legal proposition necessitates reversal of this case, because it was admitted upon the trial and found by the jury that neither the plaintiff nor the driver of the wagon looked eastward before they started to cross the defendant's track. It is true that the jury found, in answer to questions 5 and 6 of the special verdict, that neither the plaintiff nor the driver was guilty of contributory negligence; but, the fact that they failed to look and listen having been admitted and previously found, contributory negligence was thereby established as matter of law, and the question was no longer open.

Furthermore, manifest error was committed by the court in its charge with reference to the last-named question. The court charged, in substance, that, even if they did not look, still they were not guilty of contributory negligence if a

person exercising ordinary care who had looked would have considered it safe to cross the track because the car was so far east; and, further, that if the plaintiff and the driver were placed in a situation of danger by defendant's negligence, and were compelled to choose one of several lines of action in the presence of imminent danger, the fact that they did not choose the best means of escape does not charge them with negligence. Both of these propositions are erroneous; the first, because it emasculates the rule requiring a person about to cross a railway track to look and listen, and the second because it is not applicable to a case where the plaintiff, by his own negligence, has placed himself in a position of danger.

As there was no motion by defendant in the trial court to strike out the fifth and sixth findings and for judgment upon the verdict, this court will not direct judgment but will order a new trial. *Conroy v. C., St. P., M. & O. R. Co.* 96 Wis. 243.

By the Court.— Judgment reversed, and action remanded for a new trial.

BARDEEN, J., took no part.

TESCH, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

December 13, 1900 — January 8, 1901.

108 593
110 [8]156
110 [7]157
110 [1]158
110 [7]159
110 [6]855
s53 LRA 618
54 LRA 424n
108 593
54 LRA 802n
108 593
117 [8] 38
117 [8] 40

Street railways: Negligence: Injury to person driving across tracks: Contributory negligence: Duty to look and listen: Right of way: Special verdict: Instructions to jury.

1. The doctrine of comparative negligence does not prevail in this state. Therefore, in a case involving the subject of contributory negligence, the rule that obtains in some jurisdictions does not apply,

that if plaintiff was guilty of contributory negligence he may yet recover if defendant discovered his peril in time to have avoided injuring him by the exercise of ordinary care; nor the rule that, notwithstanding plaintiff's negligence, he may recover if defendant was guilty of gross negligence, speaking of fault not amounting to actual intent to injure, or that wanton disregard for the safety of others equivalent thereto sometimes called constructive intent; nor the rule that if plaintiff's negligence preceded that of the defendant in time, and the latter by the exercise of ordinary care could have avoided injuring the former and failed to do so, the negligence of the former is considered a condition, and the negligence of the latter the sole proximate cause of the injury, notwithstanding such condition was a mere continuance of the negligent act and concurred with defendant's fault at the instant of the accident to produce it.

2. The doctrine in this state is that contributory negligence of the plaintiff, however slight, precludes his recovering of the defendant on the ground of negligence, regardless of the degree thereof, speaking of conduct characterized by inadvertence, not that misconduct known in the decisions of this court as gross negligence.

3. Before crossing a railway track, regardless of whether it be a steam or electric street railroad, a person should look both ways and listen for a coming car and perform that duty when and where it will be reasonably certain to effect its purpose; and diversion of attention, generally speaking, will not excuse the performance of such duty; neither will misconduct on the part of the railway company.

4. If in taking a special verdict questions be submitted covering singly all the material controverted facts in issue, a refusal to submit other questions covering the same subjects in a different form, or covering evidentiary facts, is proper.

5. A refusal to instruct a jury in accordance with suggestions contained in special questions presented for submission to them, or the giving of instructions in regard to a particular subject, is not reversible error, if, by the verdict rendered, it is clear that the facts necessary to the applicability of such instructions given or refused did not exist.

6. An ordinary traveler upon a public street where a street-car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars, has not the same right to go upon the track and compel the stopping of a car to enable him to pass over the track as the operator of the car has to delay his passage to enable the car to pass.

7. The ordinary traveler has the right of way in crossing a street-car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car if its rate of speed is lawful; and if it turns out that he has miscalculated, he is not chargeable with want of ordinary care or with violating any rights of the railroad company if it is compelled to retard the motion of the car or even stop it to enable such person to cross the track; and in no event is such a person a wrongdoer so as to excuse the operator of the car from not exercising ordinary care to avoid injuring such person, though the fault of such person may preclude him from recovering damages for any injury that may result in part from his conduct.

8. If a person about to cross a street-car track in the circumstances above stated, observes a car that is coming towards him at an unreasonable rate of speed, or if in the exercise of ordinary care he ought to observe it, such care requires him to take that into consideration in determining the probability of his being able, proceeding reasonably under the circumstances, to clear the track and avoid being injured by a collision with the car.

9. If a person, traveling with a horse and carriage, approaches a street crossing to pass over double street-car tracks located on the street running at right angles with that on which he is approaching, observes a car coming from the left on the track nearer him and one from the right on the other track, and stops for such cars to pass, the horse being located about ten feet from the nearest car rail, and the car from the left passes by and stops at the right-hand crosswalk and the one from the right passes over the street,—the conditions being such that he can see the farther track at the right, looking by the front end of the stationary car, from a point about 100 feet from the crossing to a point about 100 feet further to the right and can see such track in front of him to the left of the stationary car for about forty feet from the point of crossing, leaving about sixty feet of the farther track to the right out of view because of the stationary car,—and a second car is approaching from the right on the farther track, a little way behind the first car coming from that direction, and at the instant the second car passes by he looks both ways for other approaching cars and sees one coming from the left, though not dangerously near, and none coming from the right, though at the instant of taking the observation one has just passed out of view within the sixty feet of track shut out from observation by the stationary car and is approaching at a speed

of ten miles an hour, an unusual rate of speed for that situation and under the circumstances, without giving any signal of its approach, and he then starts to cross the track believing the way to be safe, he is not guilty of a want of ordinary care as a matter of law. The rule requiring one to take an observation of a railroad track before attempting to cross it, reasonably calculated to acquaint him of the presence of cars in dangerous proximity to the crossing, is not in conflict herewith.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to recover damages for a personal injury. The evidence produced bearing on the issues made by the pleadings established or tended to establish the following:

Virginia street runs east and west and Reed street crosses it at right angles running north and south, in the city of Milwaukee. Such streets are about sixty feet wide between curb lines. The defendant has a double-track electric street railroad on Reed street, operated by the overhead trolley system. The streets are much used, particularly at the crossing. Street cars pass both ways at short intervals, those going south using the west track and those going north the east track. Plaintiff was perfectly familiar with the crossing and all the dangers attending its use by travelers with teams. Both streets were sufficiently level to permit a view of them either way by one standing at the crossing. There were buildings on the corners on the west side, so that one approaching the railway tracks on Virginia street from that side could not see the tracks up and down the street till he arrived at the crossing.

On November 26, 1897, commencing about 8 o'clock a. m., there was a snowstorm which lasted till after the happening of the injury, which was a little later in the day. The falling snow prevented a clear view of objects up or down the street, but the difficulty was not so great but that an approaching street car could readily be seen for a distance of more than 150 feet. The falling snow and other weather

conditions caused the street-car track to be slippery, so that it was impracticable for a motorman to control his car as completely as he otherwise could. On account of such conditions the motorman on the car that produced the injury was unable to determine readily within what distance he could stop it, because the wheels were liable to slip on the track.

In the circumstances stated, plaintiff and his brother, riding in a covered buggy, with no curtains thereon, drawn by a gentle horse, approached the crossing from the west, driving on Virginia street. As they arrived at a point where they had a full view of the street-car tracks both ways on Reed street, they observed two cars approaching, one from the north on the west track and one from the south on the east track. The cars were so near the crossing that plaintiff did not think it was safe to attempt to cross. He stopped his horse so that its feet were located about twelve feet from the west rail and the buggy seat was located about at the curb line, distant about twenty-five feet from such rail. While plaintiff was so located the car coming from the north passed and stopped to allow a passenger to alight at the south crosswalk. Immediately thereafter the car going north on the east track passed over the crossing without stopping. Plaintiff then looked both ways for coming cars and observed one coming from the north about 150 feet from the crossing, but did not see any coming from the south, though one had just disappeared from view behind the car that was located at the south crosswalk. The car approaching from the north was moving pretty fast and the motorman, observing plaintiff's purpose to cross, sounded his gong vigorously. Plaintiff, thinking he had time to make the crossing, started and moved pretty fast in order to do so. He passed over the west track safely and as he did so he looked to the south and saw a car coming from that direction and so near that it was impossible for him to es-

cape from the region of danger before the injury occurred. As the hind wheels of his buggy were about to pass over the east rail, he being located about over the rail, the car struck the buggy, partially demolished it, and threw him out forward and to one side a distance of some twenty-five feet, where he landed on the surface of the street and was injured.

There was some conflict in the evidence as to whether the gong on the car was sounded; also as to the speed of the car and the distance it traveled after striking plaintiff's buggy. On the part of plaintiff the evidence was to the effect that it was going faster than usual and some ten miles an hour. On the part of defendant the evidence was very positive to the effect that it was going at a moderate and usual rate of speed and not over five to seven miles an hour. As to the sounding of the gong, the evidence on the part of plaintiff was that he did not hear it; that other witnesses in the vicinity did not; and that if it had been sounded plaintiff would have heard it. On the part of defendant the testimony of the motorman, passengers in the car, and others was to the effect that the gong was sounded vigorously and seasonably. As to the distance the car traveled after striking plaintiff's buggy, the evidence on his part was to the effect that it passed clear over the crossing and a considerable distance beyond, one witness placing it as far as half a block. On the part of defendant the evidence was to the effect that the current was reversed and the brakes set as soon as practicable after plaintiff was observed, and that the car stopped still before passing entirely over the north crosswalk. The evidence was further to the effect that the car that stopped at the south crosswalk stood there till about the instant plaintiff started to cross the tracks; that as he arrived at a point where he could have seen the north-bound car had he been looking in that direction, and the motorman could have seen him, such car

was very near the crossing. Plaintiff testified that the car he saw coming from the north 150 feet away was coming so fast that he hurried to get by; that he did not see the other car till it was nearly to him, and then it was too late.

The jury rendered the following verdict, the substance of the findings being given, not the particular language of the verdict:

(1) Plaintiff was injured at the time and place alleged by one of defendant's street cars.

(2) The car was going at an unreasonable and dangerous rate of speed when the injury occurred.

(3) Such unusual and dangerous rate of speed was the proximate cause of the injury.

(4) The motorman, in the exercise of ordinary care, ought to have seen plaintiff's peril in time to have avoided injuring him.

(5) The failure to observe such peril in time to avoid the collision was not the proximate cause of the injury.

(6) The motorman did not signal the approach of his car to the crossing by sounding the gong.

(7) Said failure to sound the gong was not the proximate cause of the injury.

(8 and 9 omitted as immaterial.)

(10) The motorman, after seeing plaintiff's peril, used all reasonable means to avoid the collision.

(11 and 12 omitted as immaterial.)

(13) Plaintiff was not guilty of a want of ordinary care in that he did not see the car in time to avoid the injury.

(14) Plaintiff was not guilty of any want of ordinary care which contributed to his injury.

(15) Plaintiff suffered damages to the amount of $800.

At the close of the evidence a motion for a nonsuit was denied. On the coming in of the verdict there was a motion on the part of defendant to change the finding on the subject of contributory negligence of plaintiff, so as to find

that he was guilty thereof; also to change the affirmative to negative answers to the questions relating to the speed of the car and its effect in producing the injury. The motions were made specific and proper upon the theory that the evidence conclusively established the facts as defendant desired them to appear in the findings. All of defendant's motions were denied, and exceptions to the rulings in that regard and other rulings were duly preserved for review. Judgment was rendered in plaintiff's favor on the verdict.

For the appellant there was a brief by *Spooner, Rosecrantz & Spooner*, and oral argument by *C. P. Spooner*.

Edgar L. Wood, for the respondent.

MARSHALL, J. This case involves a few plain familiar principles. Little or no help can be obtained by citing cases from other courts where the facts were materially different or the principles applied not recognized as law by this court. There are no precedents, as regards the facts, in the decided cases of this or other courts, that can be considered controlling or materially helpful. Counsel for respondent has, with great industry and some misdirected professional energy, brought to our attention a mass of cases in support of the judgment; but so many of them are out of harmony with the settled rules of law recognized here that an attempt to apply them to the facts of this case is confusing instead of helpful. There is little use in referring to adjudications to the effect that a diversion of attention will excuse a person, approaching a railway track with the intention of crossing the same, from performing the duty to look both ways and listen for coming cars, so as to carry the case to the jury on the question of whether the plaintiff, seeking to recover upon the ground of the defendant's negligence, was guilty of contributory negligence, because the rule here is, as it is in most courts, that such duty is governed by a rule of law and not to be determined as a fact, from evidence, by the jury. It

is as useless to bring to the attention of this court cases where it has been held that, though the duty to look and listen exists, the testimony of the plaintiff that he performed that duty, yet did not see nor hear a coming car that was unquestionably within his sight and hearing, is sufficient to carry the case to the jury on the subject of his contributory negligence; because the rule here is that the duty to see those dangers that are in plain sight and hear those that are plainly within hearing by paying proper attention thereto, is just as absolute as is the duty to look and listen for them, and that a jury cannot be permitted to say that a person, called upon to perform that duty, did not see or hear such dangers, and base a verdict thereon. It is just as useless to urge upon the attention of this court adjudications to the effect that if plaintiff was guilty of contributory negligence he may yet recover if the defendant, after observing his peril, could have avoided inflicting the injury complained of, by the exercise of ordinary care; or cases to the effect that, notwithstanding plaintiff's contributory negligence, he may yet recover if the defendant was guilty of gross negligence, speaking of his conduct as characterized by negligence strictly so called, not intent, actual or constructive, to do the deed (see *Bolin v. C., St. P., M. & O. R. Co., ante,* p. 333); or adjudications to the effect that if plaintiff's negligence preceded defendant's a considerable period of time, by the act of going upon the track, and defendant by the exercise of ordinary care could have avoided the occurrence of the accident, the negligence of the plaintiff must be considered remote and his situation at the time of the injury a mere condition of it, and the negligence of the defendant the sole proximate cause thereof, notwithstanding plaintiff's negligence actually continued to and met that of the defendant at the instant of the accident. Such rules are found, in whole or in part, where the doctrine of comparative negligence, in whole or in part, prevails. But it does not prevail here at

all. The doctrine of this court, like that of all courts that entirely discountenance comparative negligence, is that contributory negligence of the plaintiff, however slight, precludes his recovering in an action grounded on the defendant's negligence, however great such negligence may have been. In this we do not refer to wilful misconduct of a wrongdoer, which has come to be spoken of as gross negligence, meaning, however, intent, actual or constructive, to do the injury, and not negligence at all, strictly so called. The doctrine of contributory negligence applied here has the sanction of the common law from time immemorial, the support of most of the courts and standard text writers, and half a century of the adjudications of this court. To change it, otherwise than by legislative enactment, would be judicial usurpation. Therefore it is idle to urge upon our attention authorities that cannot be applied except by such transgression.

Cases supporting each of the lines of comparative negligence, and the other rules to which we have referred, are presented here as bearing on plaintiff's right to recover, and many more might be found, especially in the inferior appellate courts of some of the states. Upon the faith of such authorities, it is believed, much money has been uselessly expended and false, unattainable hopes built up. Other courts have found it necessary, by vigorous language, to stay the tendency of such mischief. In a very recent case in Missouri the court used these emphatic words: "There is no comparative negligence in this state. The rule that the negligence of the plaintiff [want of ordinary care was undoubtedly meant] which contributed directly to the cause of the injury will prevent a recovery is without exception or qualification." The court was speaking of where recovery is sought on the ground of defendant's want of ordinary care. *Hogan v. Citizens' R. Co.* 150 Mo. 36.

What has been said is addressed to the efforts of respond-

ent's counsel to combat the main contentions upon which reliance is placed to secure a reversal of the judgment, viz., that the verdict finds and the evidence shows, as a matter of law, contributory negligence. Against that the authorities were cited, among others, which we have seen fit to criticise in a general way only, there being too many of them to warrant a review thereof in detail. We will reserve the discussion of the grounds put forth by appellant's counsel to support their main point, and the reasons for the conclusion we have arrived at, for the closing subject of this opinion.

It does not appear to be contended that there was not evidence sufficient to carry the case to the jury on the subject of whether the car was run at a negligent rate of speed and whether such fact, under the circumstances, was a proximate cause of the injury; so we need not discuss that question, though it is proper to say, in passing, that the situation disclosed by the evidence fairly raised a jury question as to each of such elements.

Some complaint is made because the court refused to submit questions requested by counsel for appellant, but it does not seem that there is any merit therein, as all the facts in issue were fully covered by the special verdict.

Complaint is also made because the court neglected to instruct the jury in regard to the duty of plaintiff to look and listen before going upon the railway track, in accordance with the suggestions contained in the questions. Also because of instructions which the court did give on that subject. In answer to such complaints, it is sufficient to say that the evidence is undisputed that plaintiff did both look and listen for a car coming from the south on the east track, before he attempted to cross it, and that he neither saw nor heard a car; and the circumstantial evidence and the verdict are consistent therewith. So it must be said that the evidence clearly shows that, at the instant when plaintiff started

to cross, the coming car that did the injury was obscured from his view by the car standing at the south crosswalk. The jury found as a fact, on conflicting evidence, that the car gong was not sounded. In view of such undisputed facts and the fact found by the jury, if error was committed either in the instructions in respect to plaintiff's duty to look and listen for a coming car and to see and observe the speed thereof, or in refusing instructions in regard thereto according to the suggestions contained in the questions which appellant's counsel requested the court to submit to the jury, no harm resulted to it therefrom. So the case comes down to what we have said is the main contention.

Appellant's counsel insist that the verdict indicates such contributory fault, because the reasonable meaning of the finding that the motorman ought, in the exercise of ordinary care, to have seen respondent in time to have avoided the injury, is that he ought to have seen him before the view was cut off by the standing car, in which case, obviously, plaintiff ought at the same time to have seen the coming car and not started across the track. We do not think counsel's idea of the meaning of the verdict is correct. Taking the finding in connection with that in regard to the dangerous speed of the car, and in connection with the undisputed evidence, it is very clear that what the jury meant was, that if the motorman had been operating his car at a reasonable rate of speed, under the circumstances, he would have seen plaintiff upon the track in time to have checked it and thereby avoided the injury. In that view, the finding as to the motorman's failure of duty in not seeing respondent is perfectly consistent with the finding of freedom from contributory fault on the part of the latter in failing to observe the car in time to keep out of its way.

To further support the main contention, it is insisted that respondent, as a matter of law, not only should have looked for the coming car from the south on the east track before

he started to cross, but should have seen the car that did the mischief if it was within the line of his vision looking by the front end of the car located at the south crosswalk, and that if it was not, because it had passed out of view within the territory shut out from observation by the stationary car, he should have anticipated the probability of a car being so located and not attempted to cross the tracks until such stationary car moved on; that is, that the rule of law requiring a person to look and listen for a coming car before entering upon a railway track, includes the duty not only to discover what is observable by the senses of seeing and hearing, but the duty to use such senses when and where they will be reasonably certain to discover the existence of a car dangerously near the crossing, if there be one. No fault can be found with the rule, but, applying it to the evidence as a test of plaintiff's conduct, in view of other settled legal principles, we still have difficulty in saying that there was not a fair question of fact left for the jury to solve. The industry of counsel for appellant has not been rewarded by discovering precedents which may be referred to as material aids in solving such difficulty; and our labor to that end has not met with any more satisfactory result. Counsel for respondent has not been more successful. The cases cited to our attention by the latter, the strongest of them being from inferior appellate courts, to the effect that respondent was not bound to wait for all the cars that might be coming to pass by — that he had as much right to use the crossing so as to make defendant check the car to allow him to pass over the tracks as appellant had to delay respondent in order to allow the car to pass over the crossing — are not useful. Such expressions, found in legal opinions to support decisions, do not accurately state the law. They proceed on a misapprehension of the relative rights of street-car companies and ordinary travelers, and have a mischievous effect. Such travelers have only the

common right, while a railroad company has special rights granted to it by the state through the municipality as its agent. The public thoroughfares are under the control of such public agencies, to be used in such reasonable ways as their appropriate governing bodies may determine not inconsistent with the original design. In the exercise of undoubted power, the common council of the city of Milwaukee granted appellant, or some person under whom or corporation under which it claims, the right to maintain and operate its double-track street railroad, and, so far as appears from the evidence, without any restrictions as to the speed of cars or the manner of crossing streets. Such granted rights contemplated rapid transit within reasonable limits, and that ordinary travelers on the street should, to a reasonable extent, shape their conduct with regard thereto. In the use of its granted rights appellant is considered a public agent. It has, impliedly, such privileges as are reasonably necessary to effect the object of its grant. In order that it may enjoy such privileges, ordinary travelers, when upon its track, should give way for the passage of cars and be ready to do so in order not to delay the transit thereof. They ought not to go upon the track if a car is approaching at a lawful rate of speed and reasonable opportunity does not exist to pass over in safety. If the car is approaching at a negligent rate of speed, and the traveler observes it or ought reasonably to do so, such negligence will not justify a traveler in breaching his duty, to exercise ordinary care for his own protection, by placing himself in the way of such car.

The traveler's duty, confining it to a street crossing of a street-car track, is stated by the supreme court of New Jersey substantially in this way: 'The driver of a team in crossing a street-car track has the right of way if, by proceeding at a rate of speed which under the circumstances of time and locality is reasonable, he will reach the place of crossing in time to safely go upon the track in advance of an

approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it will reach him;' that is, if the driver, proceeding reasonably under all the circumstances, enter upon the track, having exercised reasonable judgment as regards the time necessary to stop the car before reaching him, he is not guilty of any breach of ordinary care, even though it shall turn out that he has miscalculated. *N. J. E. R. Co. v. Miller*, 59 N. J. Law, 423. Respondent's counsel relies on that and similar cases. It should be said in passing that the court, in connection with stating the rule as indicated, approved a charge given by the trial court to the effect that a person, in approaching a street-car track for the purpose of crossing the same, where his view is impeded by vehicles or he cannot see up the track, should wait till he reaches a point where his sight is not impeded, before going upon the track; that he ought to be able to see far enough up the track to see that he has the right of way. To that the trial court added this test of when such right of way exists: He has the right of way if he can get upon the track before the car would reach that point if going at a reasonable rate of speed. That was condemned by the appellate court because of two elements: First, that indicating a right on the part of the traveler to get in the way of a coming car by his activity and compel the person in charge thereof to check its speed; second, the right to ignore the actual speed of the car however plainly observable. The true test was given in substance as before indicated, omitting the element permitting the traveler to run a race with a car in order to go upon the track in advance of it, and that permitting him to ignore the unusual rate of speed, but retaining the idea that the traveler need not check his speed to allow a car to pass, but that, traveling at a usual rate, he may go in front of the car, giving time only for the motorman to stop it if need be before reaching the traveler. That is in the nature of an amend-

ment of street-car franchises. Certainly, such privileges as are reasonably necessary to the discharge of the duty of a street-car company to the public in transporting persons from place to place on the street, in the way in which such business is ordinarily conducted, are incident to the franchise to maintain and operate the road, in the absence of municipal regulations or something in the franchise or some state police regulation to the contrary. In the absence of any such regulation, the purpose of such a utility is so inconsistent with every traveler upon the street where it exists having the right to go upon the track in advance of a coming car by merely calculating on the time necessary for the car to be stopped before reaching the crossing, that it is not perceived how a court can say that such right exists without exercising legislative functions and judicially, in form, restricting the plain intent of the legislative grant.

The test of the ordinary traveler's right in crossing a street-car track, to harmonize reasonably with the spirit of an unrestricted franchise to maintain and operate, as regards the rights of other users of the way, may properly be stated thus: A person desiring to cross a street-car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining

whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else.

We are not unmindful of the fact that the rule stated places quite a burden upon the ordinary use of the streets by persons traveling thereon in the ordinary way, especially where there are double tracks with center supporting poles and cars passing both ways at short intervals; but that is one of the incidents of our modern civilization. Everything must move fast. People as a rule will not tolerate anything else. Street-car companies are expected to conform to the public demand in that regard, and are granted franchises, as indicated, in that view. The dangers that result are great and constant. The army of dead and maimed because of such dangers is numerous and being daily added to. But a remedy therefor must not be sought by appealing to courts to change established rules of law in order to indemnify the sufferers; but by appealing to the lawmaking power for such regulations of the construction and operation of street railroads, and the use of streets for such purpose, as will concur with and render such use more in harmony with their safe and convenient use by ordinary travelers, leaving courts to administer justice for wrongs committed notwithstanding, according to the law as they find it.

Now when we apply the test above indicated to respondent's conduct, the difficulty with saying he was guilty of contributory negligence by no means disappears. We must keep in view the peculiar situation he was in when and just before he started to cross the track, in determining whether there was a breach of duty on his part in not discovering the coming car or waiting till he had opportunity therefor. The east track south, looking by the south end of the stationary car, was observable for a distance of probably 100 feet at least; we cannot say further with certainty, in view of the evidence as to the storm that was in progress and

other conditions. The track was observable, looking directly east and southeast, by the north end of the stationary car, for a distance of about forty feet. Between the two parts of observable track there was a space of about sixty feet that was obscured by the standing car. From a point where the car came into view from the south till it passed out of view in the region obscured by the stationary car, at the speed it was moving, it took only about six seconds. As respondent came to a stop on the west side of the street, he saw a car approaching from the south as well as one from the north, and waited for them both to pass. The one from the north passed first. As soon as the one from the south was clear of the crossing, he looked again both ways, and not observing any car approaching from the south, but seeing one coming from the north, a sufficient distance away, however, to enable him to safely cross the tracks, he started. In the time it took for the first car from the south to pass over the crossing, and while respondent was waiting for it to so pass, the six seconds reasonably elapsed necessary for the second car from the south to come into view, pass over the track that was observable to the south, and enter the region of obscurity behind the stationary car, so that when respondent looked before starting to make the crossing there was no moving car in view, south. He made the start supposing that it was safe to do so.

There was no breach of duty to look both ways and listen. Was it, as a matter of law, want of ordinary care on the part of respondent not to have anticipated the probability of a car being obscured from his sight within the sixty feet of space he could not see by reason of the stationary car? It seems that the term "probability" should be changed to "possibility" in view of the verity in the case that the car was going at an unusual rate of speed, so that it came into and passed out of sight in a few seconds of time. That would be placing the standard of ordinary care, which one must

exercise as a matter of law, higher, as it seems, than any established rule of law with which we are familiar will permit, or any precedent, that has been cited to our attention or that we have been able to discover, will justify. If the track had been obscured from the region of the crossing south for substantially all of the way within which an approaching car could otherwise have been seen and would have been, as a matter of law, dangerously near as regards plaintiff's crossing the track, the situation would be far different. It was to such a circumstance, among others, that the attention of the court was directed in *N. J. E. R. Co. v. Miller*, 59 N. J. Law, 423. The same is true of *Langhoff v. M. & P. du C. R. Co.* 19 Wis. 489. There two trains were approaching on parallel tracks and substantially side by side, one of the trains being obscured from view by the other, and the track on which it was moving, except from the crossing to about the head of the observable train, was all out of view; yet the court held that the plaintiff was not guilty of want of ordinary care in not anticipating the probability of there being a second train obscured from the injured person's point of observation by the one that was in sight. The situation was similar, on principle, in *Newark P. R. Co. v. Block*, 45 N. J. Law, 605; *Oleson v. L. S. & M. S. R. Co.* 143 Ind. 405; *Hovenden v. Pa. R. Co.* 180 Pa. St. 244; and other cases cited by appellant's counsel, and many others to be found in the books. They are analogous to *Johnson v. Superior R. T. R. Co.* 91 Wis. 233, where the railway track, except at the crossing and the immediate vicinity thereof, was obscured from view by the curtains of the driver's vehicle.

There is nothing in what has been said, nor the conclusion here reached, militating against the rule that a person, approaching a railway track with a view of entering upon it, must look both ways and listen, and that the performance of that duty is not excused by negligence on the part of the

railway company, and that the duty to look and listen includes that of performing such duty when and where it will be reasonably certain to effect its purpose, as laid down by standard text-writers, numerous decisions of this court, and most of the courts elsewhere. Elliott, R. R. § 1166; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Oleson v. L. S. & M. S. R. Co.* 143 Ind. 405. This decision goes no further than that, under the circumstances of this case,— the most significant being that a car had just passed by on the east track, that the entire track within which an approaching car would have been dangerously near was in view except a small space thereof over which a car going at the speed of the one in question would pass in four seconds, and that no signal of the presence of the car was given,— it is susceptible at least of a reasonable inference that the attempt to cross the track on the theory that a car was not hidden from view in such short space, was not inconsistent with ordinary care. That raised this question of fact: What was the proper inference to be drawn? It was the province of the jury to solve that question. Every principle of law bearing on the case seems consistent with this conclusion, and all light obtainable from precedents is consistent as well.

By the Court.— The judgment of the superior court is affirmed.

BARDEEN, J., took no part.

McNamara, Respondent, vs. McNamara, Appellant.

December 13, 1900 — January 8, 1901.

Physicians and surgeons: Services in consultation: Value: Evidence: Hypothetical questions: Improper conduct of attorneys: Court and jury: Perverse verdict: Excessive damages: Remission of part: New trial.

In an action by son against father, both being physicians, for plaintiff's services in consulting with defendant in his practice during a period of about six years, the parties were directly in dispute as to the employment and promise to pay, and both were involved in contradictions and had made inconsistent statements. Plaintiff had kept no books and made no memorandum even of a single case in which he had consulted with defendant, but merely gave his estimate of the number of cases and the value of his services therein. Hypothetical questions put to physicians called as experts in respect to value did not cover the material facts, such as the relationship of the parties, the circumstances under which the services were rendered, the time employed, etc. There was much bitterness between the parties, and on the trial there were improper remarks of counsel, offers of incompetent testimony, and improper questions on cross-examination, which had a tendency to inflame the minds of the jury and create a prejudice against defendant. Plaintiff had a verdict for $11,000, which the court reduced to $6,000. *Held*, that the verdict did not represent that calm, fair, and impartial consideration which should characterize the decision of questions of fact; that passion and prejudice probably affected the decision, not merely of the question of damages, but also of the other questions in the case; and that therefore the trial court should have granted a new trial absolutely.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is a controversy between son and father. Both parties are physicians, practicing in the city of Milwaukee. The plaintiff brings this action against his father to recover the sum of $12,000 for consulting and advising with him in his practice, from January 1, 1892, to October 31, 1897, basing his right to recover upon an express promise by the

father to pay what such services were reasonably worth. The answer is a general denial, with a counterclaim for money advanced by the defendant to pay for advertisements in several Milwaukee papers. The plaintiff replied by way of denial.

The jury brought in a special verdict, in which they found: (1) That plaintiff performed services for defendant between January, 1892, and October, 1897; (2) that about January, 1892, defendant agreed to pay plaintiff for future services to be rendered by him in defendant's business; (3) that plaintiff performed such services pursuant to such agreement; (4) that such services were reasonably worth $11,000. The defendant moved to set aside the verdict and for a new trial on grounds, among others, as follows: That the verdict was excessive, and the result of passion and prejudice, incited by remarks of counsel and by repeated offers of incompetent testimony; that the court erred in instructions to the jury, and failed to give certain instructions requested by defendant; that the court erred in the reception and rejection of evidence; and that the verdict was against the weight of the evidence. Upon consideration of the motion, the court ordered that "the plaintiff either take $6,000, or a new trial will be granted." The plaintiff remitted $5,000 from the verdict, and entered judgment for $6,000 damages and costs. The defendant appeals.

For the appellant there was a brief by *W. J. Turner*, of counsel, and *J. E. Wildish*, attorney, and oral argument by *Mr. Turner*. To the point that it was error to refuse to set aside the verdict because of the improper remarks of plaintiff's counsel in opening the case and his persistent offers of incompetent testimony to influence the jury, they cited *Schaidler v. C. & N. W. R. Co.* 102 Wis. 564; *Andrews v. C., M. & St. P. R. Co.* 96 Wis. 348; *Schillinger v. Verona*, 88 Wis. 317; *Taylor v. C. & N. W. R. Co.* 103 Wis. 27; *Waterman v. C. & A. R. Co.* 82 Wis. 613; *Susse v. State*, 68

Wis. 530; *Elliott v. Espenhain*, 59 Wis. 277; *Hennies v. Vogel*, 87 Ill. 242; *McDonald v. People*, 126 Ill. 150, 9 Am. St. Rep. 547, and note; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157; *Scripps v. Reilly*, 38 Mich. 10; *Cleveland P. Co. v. Banks*, 15 Neb. 20; *Tucker v. Henniker*, 41 N. H. 317; *Kinnaman v. Kinnaman*, 71 Ind. 417.

J. H. Stover, attorney, and *H. J. Killilea*, of counsel, for the respondent, contended, *inter alia*, that appellant cannot now avail himself of any improper remarks of counsel during the trial, because no objection or exception was taken at the time. *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500; *Lynch v. Peabody*, 137 Mass. 92; *Heucke v. Milwaukee St. R. Co.* 69 Wis. 401; *Laue v. Madison*, 86 Wis. 462; *Powers v. Mitchell*, 77 Me. 361; *Learned v. Hall*, 133 Mass. 417; *Dowdell v. Wilcox*, 64 Iowa, 724; *Mulcairns v. Janesville*, 67 Wis. 35; *Wegner v. Second Ward S. Bank*, 76 Wis. 250; *Meyer v. Milwaukee St. R. Co.* 90 Wis. 526.

BARDEEN, J. The controversy herein is between son and father. Like most family disputes, there is an express affirmation of fact on the one side, and an equally positive denial on the other. Considerable of the bad feeling and bitterness of the parties was injected into the case. It came in through improper remarks of counsel, offers of incompetent testimony, and in matters of cross-examination foreign to the issue on trial; all of which had a tendency to inflame the minds of the jury and divert their attention from the actual controversy between the parties. The defendant was in his seventy-ninth year. His former wife was dead. A few years prior to the trial he married again. In opening the case to the jury, plaintiff's counsel said: "This new relation has hardly taken place until the temperature of the frigid zone came into the house." Again, referring to a demand made by the plaintiff upon his father for pay, he quotes the father as saying: "My son will not get one

dollar for what he has done, and to avoid paying my son one dollar I will deed every foot of my property I have to my wife, so that if my son does get a judgment he can keep it. He won't be able to collect it." Upon objection by defendant, the court dismissed the matter by reminding plaintiff's counsel that he was "moving on very dangerous ground." Such language alone might not be sufficiently prejudicial to reverse a case, but, when coupled with other matters hereinafter to be mentioned, it served to create prejudice in the minds of the jury towards defendant. On the trial the counsel asked defendant whether he had not lost all affection for his first wife's children, and whether it was a matter of any concern to him if his invalid daughter was in want or suffering,— matters that were irrelevant to the issue, but having a tendency to create a bad impression against the defendant, although ruled out. Again, on cross-examination of defendant, plaintiff's counsel produced a deed, and sought to ascertain whether he had not, within a short time after the son had demanded a settlement, deeded a long list of property to his wife. At another time he was asked if, on the day he received a letter from the attorney then representing plaintiff, he did not go and make a transfer of his property. In the parley before the jury, counsel stated to the court that such evidence might have some bearing if a man was in the habit of covering up his property. The court promptly ruled out the questions, but he could not strike from the mind of the jury the bad impressions against the defendant. The earnestness of counsel and the partisan feeling engendered on the trial sometimes leads counsel to do things which their sober judgment will afterwards condemn. Many of the questions referred to were not proper as cross-examination, and much of the testimony sought to be elicited was incompetent and immaterial. It had a direct tendency to inflame the minds of the jury and create a prejudice against the defendant. We have men-

tioned these matters as furnishing some ground for saying that the verdict in this case does not represent that fair and impartial consideration which should characterize the decision of disputed questions of fact. *Scripps v. Reilly*, 38 Mich. 10.

Upon the main question in the case, of whether there was an employment and a promise to pay, the parties were directly in dispute. Both were involved in contradictions and had made inconsistent statements. The jury were at liberty to believe whichever they chose. There was some evidence to support the conclusion reached, and, independent of other considerations, we should not be disposed to set aside their conclusion. Upon the question of the value of plaintiff's services, the jury seems to have gone widely astray. The plaintiff kept no books of account. During all the years he claims to have been in his father's employment he never made a memorandum of a single case he treated, or concerning which he counseled or advised his father. His guess was that his father called upon him on the average of four times a week, and that he counseled with him as to four cases at each visit. His estimate was that he advised with his father concerning 1,000 cases each year, and that his services were worth a little less than $2 for each case. He was unable to state what he did in any given case, and had no memorandum or record from which he could determine the number of cases in any one week or month he acted as counsel in. Nor did he have any data or remembrance as to how much time he spent in his father's service. Three physicians were called as experts for the plaintiff, who testified as to the value of his services. Neither one was put in possession of the actual facts in the case, but they were asked a hypothetical question similar to the following: "*Q.* Doctor, if the defendant in this case consulted with the plaintiff in a professional capacity on an average four times a week, and at each consultation discussed four patients on an average,

or say sixteen to eighteen cases a week, and in that consultation the plaintiff would prescribe for the different parties, give advice as to the medicine to be given, how given, and the general treatment, and all such other advice and information as is incident to a consultation for treatment, those cases being of a syphilitic nature and venereal character entirely, or ninety per cent. of them at least, what, in your opinion, would such services be worth per year?" Dr. Violet answered that such services would be worth in the neighborhood of $4,000 per year. He admitted that he had never had any experience in a like situation, but was testifying according to the fee bill fixing rates for consultation. Dr. Carlson had never heard of such an arrangement before, but he would charge $4,160 per year for such services. Dr. Hayes thought from $2 to $5 a consultation would be a reasonable charge. That such testimony was of no value in arriving at a correct conclusion is evident from the fact the hypothetical question did not cover the material facts in the case. The relation of the parties, the circumstances under which the services were rendered, the time employed, the nature and extent of the consultation, and all the circumstances surrounding the service were material in arriving at a reasonable answer. The attempt to apply fee-bill charges to such a situation was absurd, and the trial court evidently thought so when he cut $5,000 from the verdict.

When we come to consider the nature of this testimony in connection with the other matters herein referred to, we cannot resist the impression that the verdict does not represent that calm, fair, and impartial consideration necessary in judicial proceedings. In other words, that it was perverse in the sense that prejudice was aroused against the defendant and that no proper foundation for the recovery allowed is found in the evidence. It is true the trial court cut the verdict, and reduced the recovery to $6,000. That the court had such power is now the settled doctrine in

this state. *Corcoran v. Harran*, 55 Wis. 120; *Gillen v. M., St. P. & S. S. M. R. Co.* 91 Wis. 633; *Donovan v. C. & N. W. R. Co.* 93 Wis. 373; *Taylor v. C. & N. W. R. Co.* 103 Wis. 27; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307. Where it appears with reasonable certainty that the recovery is so excessive as to create the belief that the jury have been misled by "passion, prejudice, or ignorance," the trial court may either grant a new trial absolutely, or give the plaintiff the option to remit the improper excess. But the rule is only applicable in cases where it is clear that the perverse conditions mentioned only affected the amount of the recovery. If it appears that the elements of passion and prejudice may have entered into, and probably did affect, the decision of other questions in the case, the court's duty is to grant a new trial absolutely. Such we believe to be the situation in this case. The evidence shows that the parties are greatly embittered towards each other. The evidence tending to the corroboration of the one or the other is of a vague and shadowy character. The cause of action and the defense depends very largely upon the testimony of the respective parties. The introduction of extraneous or immaterial matters tending to the prejudice of the one or the other might turn the scale either way. Justice demands that the case should be calmly tried and the jury permitted to reach a conclusion upon legitimate and competent evidence alone.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

108 620
113 [4]608

108 620
115 [3]161

HUNTER, Appellant, vs. HATHAWAY, Respondent.

December 13, 1900 — January 8, 1901.

Landlord and tenant: Agreement to put house in good condition: Counterclaim for breach: Amendment: Tort or contract? Agency: Damages: Evidence: Merger of prior negotiations in lease: Implied covenants.

1. In an action to recover rent defendant counterclaimed upon a promise made prior to the leasing to put the premises in first-class condition, alleging insufficiency of the heating apparatus as a breach. The counterclaim was amended so as to allege that prior to the leasing plaintiff had knowingly made false statements as to the sufficiency of such heating apparatus, to induce defendant to enter into the lease, and that defendant relied thereon. *Held*, that this was not intended to change the cause of action to one in tort, but merely to negative any inference of intended waiver of the alleged pre-existing contract as a result of the making of the lease.
2. The alleged promise to put the premises in first-class condition was made by a real-estate agent who had been asked by plaintiff to find a tenant for the house and whom defendant had asked to find a house for him, but there was no evidence that plaintiff had authorized the making of such promise or even knew of it. *Held*, that there could be no recovery thereon.
3. The evidence as to damages in support of such a counterclaim should show not merely that defendant was inconvenienced in or deprived of the use of a part of the house, or that he burned a large amount of coal, because of the insufficiency of the heating apparatus, but should show the effect of such inconvenience or deprivation on the rental value of the premises, and the value of the extra coal consumed.
4. It appeared, in such case, that the letter of the agent which contained the promise that plaintiff would put the house in first-class condition was a mere preliminary proposal, and that after further negotiations the parties "concluded a bargain" and, after the work on the house was completed, executed a lease for more than three years. *Held*, that all previous negotiations were merged in the lease, and that under sec. 2204, Stats. 1898, no covenants as to the condition of the house were implied therein; so that there was no contract to support the counterclaim.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Some time in the month of June, 1895, defendant, desiring to take up his residence in Wauwatosa, applied to a real-estate agent (Sanford) to find him a house. Plaintiff, having a vacant house, had requested Sanford to find her a tenant. Sanford, on June 17th, wrote *Hathaway:* "I saw the Moor family. They will rent house for five years as is at $18.00 per month. If they add any more repairs and c., they will ask more rent. They will set a price when they hear what is wanted to be done to the property. The Hunters will put their house in A1 order, and charge $25.00 per month. I saw both Mr. & *Mrs. Hunter* this a. m." Sanford testifies that he notified *Hathaway* by that letter, whereupon Mrs. Hathaway came down and looked at the house. "We concluded a bargain, and the doctor rented it." Thereupon the plaintiff proceeded to put the house in order,—papering, painting, etc.,—and *Hathaway* moved in before the painting was completed; and a few weeks afterwards, when the work of putting house in order was apparently all done, executed a lease, dated back to July 1st, for four years and ten months, at $300 a year, payable monthly. The furnace, under *Hathaway's* management, proved unsatisfactory, and he suffered from cold and inconvenience, and was unable to heat more than a part of the house. Nevertheless, he remained in the house three winters, until April, 1898, when, against plaintiff's protest, he vacated. This action was to collect the next month's rent.

Defendant set up by way of defense that plaintiff agreed to put the house in first-class condition, and that she failed to do so, in that the furnace was inadequate. He also pleaded a counterclaim alleging the same agreement, and the insufficiency of the heating apparatus as a breach thereof, and claimed damages in the sum of $200. Upon the trial he was allowed to amend both the answer and counterclaim by al-

leging that plaintiff, prior to making the lease, represented and warranted that the furnace and heating apparatus were sufficient and had never given plaintiff any trouble, which representation was made to induce defendant to enter into the lease, and was relied on by him; and that plaintiff at the time of making said representation and warranty knew the same was untrue. Allowance of this amendment was excepted to. Defendant offered evidence tending to show inadequacy of the furnace, and inability to comfortably use a considerable portion of the house during cold weather; also, that after the repairs were completed, having learned from former tenants that they had trouble in heating the house, he asked the plaintiff with reference to the furnace, to which she replied that she never had any trouble with it. No evidence of the falsity of this statement was offered except that Hugh Ryan, while occupying the house, believed that he made complaint to her, about which she did nothing. No evidence was offered of the rental value of the house either in good condition or in the condition in which defendant found it, nor was any given of other specific money damage. Neither was any evidence offered of the authority of Sanford to write the letter of June 17th, nor of any knowledge thereof on the part of the plaintiff.

Plaintiff objected to any evidence under the counterclaim, and moved for direction of a verdict in her favor, both of which motions were overruled. The court submitted and answered questions as to amount of rent due, $27.62. He also submitted to the jury a second question, to wit: "Subject to the opinion of the court as to defendant's right to recover, what damage, if any, has the defendant sustained by reason of the failure of the furnace in question to properly heat the house during the time that a furnace was necessary to be used?" to which the jury answered, $150. No further verdict was taken. Thereupon defendant moved for judgment notwithstanding the verdict, and moved to

set aside the answer to the second question, and moved for a new trial, which motions being overruled the court ordered judgment in plaintiff's favor for the amount of the rent and in defendant's favor for $150 damages, and judgment was accordingly entered in favor of defendant for $122.38, from which this appeal.

For the appellant there was a brief by *Nath. Pereles & Sons*, attorneys, and *Guy D. Goff*, of counsel, and oral argument by *Mr. Goff*.

For the respondent there was a brief by *Wheeler & Perry*, and oral argument by *L. G. Wheeler*.

DODGE, J. The counterclaim in this case was obviously grounded on contract. It alleged an agreement substantially in accord with the letter from Sanford to *Hathaway*, and we construe it as unchanged in this respect by the amendment permitted on the trial alleging that prior to making the lease certain false statements were knowingly made by plaintiff and relied on by defendant. It would not have been proper, under the circumstances, for the court to have permitted an amendment changing the cause of action from contract to tort. *Kewaunee Co. v. Decker*, 34 Wis. 378; *Kruschke v. Stefan*, 83 Wis. 373. And indulging, as we must, in all reasonable presumptions in favor of proper action, we must assume that this amendment was inserted not to state a new cause of action founded upon deceit, but to prevent the inference of an intended waiver of the alleged pre-existing contract as a result of the making of the lease. We are confirmed in this view by respondent's own contention in his brief on this appeal that such was the only purpose of the amendment. We need not, therefore, decide whether a cause of action founded upon said false statements could at any stage have been pleaded as a counterclaim to plaintiff's cause of action for rent. So viewing the complaint, it is obvious that the evidence wholly fails to establish any cause of action in defendant's favor, first, for

the reason that there was no word of evidence that Sanford had any authority from plaintiff to write the letter of June 17th, or to make any such promise as is contained therein, nor is there any evidence that plaintiff afterwards assented to or ratified either such letter or promise; indeed, none that she ever knew any such had been written or made.

Again, judgment in favor of defendant on the counterclaim fails of any support in the evidence as to damages. True, it was shown that defendant was inconvenienced in or deprived of the use of some rooms in the house during some period of time each winter, and that he burned a large amount of coal; but he offered the jury no evidence as to the effect of such inconvenience or deprivation upon the rental value of the premises. As to that as an element of damage the jury were left wholly in a field of conjecture, with no evidence to guide them as to the amount which might be allowed therefor. The same is true both with reference to any excessive quantity of coal that might have been consumed or the value thereof,— both are left by the evidence wholly indefinite.

Deeper, however, than these defects in the trial is the consideration that any such statement as that embodied in Sanford's letter of June 17th is obviously no more than mere preliminary proposal and negotiation leading up to the ultimate transaction of renting the house; and, since that transaction was reduced to writing in the form of a lease, all previous negotiations or proposals were merged therein. *Cooper v. Cleghorn*, 50 Wis. 113, 123; *Hubbard v. Marshall*, 50 Wis. 322, 326; *Moulton v. Kershaw*, 59 Wis. 316; *Lyman v. Robinson*, 14 Allen, 242, 254; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Renard v. Sampson*, 12 N. Y. 561. The language of the letter itself indicates that the basis on which the parties approached each other was that of negotiation merely. The letter is incomplete as to terms, for no length of rental is mentioned, and the indefiniteness of the terms as to the other house could have been significant of no other purpose

than to invite further negotiations. This understanding of the situation is confirmed by the conduct of the defendant, who afterwards looked at the house, "concluded a bargain," and rented, and entered into a lease. At that time the work was all done. Defendant did not proceed on the theory that he had an enforceable contract that the heating apparatus *should* be made all right, but, before making the lease, inquired as to the existing fact.

Clearly, therefore, admission in evidence of this letter from Sanford was error; but, being admitted, it had no tendency to prove any contract additional to or different from the lease. That instrument being for more than three years, no covenants as to the condition of the house were implied. Sec. 2204, Stats. 1898; *Koeber v. Somers*, *ante*, p. 497. There was, therefore, no contract proved to support the counterclaim, and the court should have granted plaintiff's motion to direct a verdict in her favor.

Errors are assigned upon the judge's charge, which occupies several pages and extends over the rules of law governing the liability of defendant for rent and that of the plaintiff for false representations; covering, too, the conduct of the jury in deciding whether representations were made, whether they were false, etc., and whether they had been waived. We need not, however, consider appellant's criticisms of these instructions, for the court did not submit to the jury any questions to which they could relate. Those instructions are of no materiality except, perhaps, as indicating the mental processes of the trial judge in reaching his decision in favor of defendant upon the counterclaim. That decision we have already found to be wrong for other reasons, and may forego discussion of the rules of law promulgated in the charge.

By the Court.— Judgment reversed, and cause remanded for a new trial.

BARDEEN, J., took no part.

108 626
112 *518
112 *520

WEBBER, Appellant, vs. WEBBER and others, Respondents.

December 13, 1900 — January 8, 1901.

Wills: Construction: Devise in trust: Validity: Suspension of power of alienation: Estates tail: Seisin.

Land was devised to trustees to receive the rents, issues, and profits thereof during the life of testator's son, and to pay the net income to said son during his life, and upon his death to convey the land "to his *issue then living* in fee, or, in case he shall die *without issue*, then in that case the same to descend to" the testator's heirs at law then living. The son had but one child, which died before his death. After his death his widow claimed the land. *Held:*

(1) The words "issue then living," and also the words following, "without issue," meant issue living at the time of the son's death.

(2) The trust so created was not a mere passive or dry trust such as had been abolished by statute (secs. 2073–2075, Stats. 1898). It did not entitle the son to the "actual possession of the lands and the receipt of the rents and profits thereof," as provided in sec. 2073; nor was it intended thereby to vest in him "the right to the possession and profits," as provided in sec. 2075.

(3) The trust was one expressly authorized by sec. 2081, Stats. 1898. It did not suspend the absolute power of alienation for a longer time than during the life of the son, and therefore was not repugnant to sec. 2039, R. S. 1878.

(4) The devise did not create an estate tail in the son, and it cannot therefore be adjudged, under sec. 2027, Stats. 1898, that he was seised thereof as an allodium.

(5) The son never having been seised of the land devised, it did not pass from him to his widow.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

N. S. Murphey, for the appellant.

David S. Ordway, for the respondents.

CASSODAY, C. J. This is an appeal from a judgment of the circuit court affirming a judgment of the county court construing a portion of the will of William A. Webber, deceased,

and distributing certain property held in trust under the third subdivision of that will.

It appears from the record, and is undisputed, that the will was executed October 16, 1884; that William A. Webber died November 15, 1884, leaving such will, which was duly admitted to probate, and also leaving, him surviving, his widow, Mary H., and five children, *Albert G.*, William F., Wilkie A., Harry J., and *Harriet A.;* that William F. never married, but died intestate August 25, 1888, and his portion of such estate and all his property descended to his mother, Mary H. Webber; that January 17, 1889, Mary H. executed her will; that January 15, 1890, Mary H. died testate, and her will was admitted to probate soon after; that the son Harry J. was married to the appellant herein, *Annie Webber*, June 11, 1883, more than a year before the execution of the will in question; that as the fruit of that marriage a child, Blanche Webber, was born to the appellant, *Annie Webber*, and Harry J. Webber, October 21, 1893; that the child Blanche died June 16, 1898; that Harry J., the father of the child, died testate, leaving no issue him surviving, but leaving his widow, the appellant herein, to whom he gave, devised, and bequeathed by such will all the property of which he died seised, and that such will was duly admitted to probate.

By the first clause of his will, William A. Webber gave and bequeathed all his personal property to his widow, Mary H., subject to the payment of debts, funeral expenses, and charges of administration. By the second clause of the will, he gave and devised all his real estate to his widow, Mary H., for and during the term of her natural life, but in trust to take care of and manage, and to receive the rents, issues, and profits thereof, and to pay and distribute the net income therefrom quarter yearly, as therein stated, to wit, to *Harriet A.* the net income of certain specific property, and the undivided one-sixth of the net income of the remain-

der of his real estate to each of his five children. By the third clause of his will he gave and devised all of his real estate, from and after the death of his wife, as therein prescribed, to wit: Certain specific real estate, and also the undivided one-sixth part of the remainder thereof, to his daughter, *Harriet A.*, upon the terms and conditions therein named; also another undivided one-sixth part of such residue to each of his three sons, *Albert G.*, William F., and Wilkie A.; and also another undivided one-sixth part of such residue he gave and devised to such person or persons as his wife might convey or devise the same to, and to his or their heirs and assigns, forever. Such portions of the will above mentioned were construed and determined in *Saxton v. Webber*, 83 Wis. 617, 623–630, and are not here in controversy.

As to the other undivided one-sixth part of such residue from and after the death of his wife, and which is here in controversy, he disposed of it by the remaining portion of the third clause of the will, which reads as follows: "And to such person or persons as the county court or court or judge having probate jurisdiction in the county of Milwaukee may appoint trustee of the same, I hereby give and devise, as aforesaid, the remaining one undivided sixth part of the said rest and residue of my said real estate, in trust, nevertheless, to take care of and manage, and to receive the rents, issues, and profits thereof, for and during the term of the natural life of my son Harry J. Webber, and to pay the net income therefrom to my said son Harry J. Webber, quarter yearly, for and during the term of his natural life, and upon his decease to convey the said trust estate to his *issue then living in fee*, or, in case he shall die without issue, then in that case the same to descend to my heirs at law then living in fee."

The case of *Saxton v. Webber*, 83 Wis. 617, was commenced by *Harriet A.* and her husband, May 14, 1890, for partition of the real estate and construction of the will of William

A. Webber, deceased. The clause of the will in controversy was construed in that case as follows: "The devise of the one undivided sixth part of the lands not specifically described to such person or persons as the county court might appoint, in trust to take care of and manage, and to receive the rents, issues, and profits thereof, for and during the life of Harry J., and to pay the net income therefrom to him quarter yearly during his life, and upon his decease to convey the same to his issue then living in fee, or, in case he shall die without issue, then and in that case the same to descend to such of the heirs at law of the testator in fee as shall then be living, only ties up said estate so devised in trust during the life of said Harry J., and hence is not repugnant to the statutes cited, but is a valid trust. It follows that the plaintiffs can claim nothing by virtue of the peculiar provisions of that devise in this action for partition." 83 Wis. 630, 631. Counsel for the appellant contends, in effect, that such construction was unwarranted, and that the last part of the clause quoted should be construed as if it had read: "In case said Harry J. Webber shall die without *having had issue*, the same to descend to my heirs at law then living." Such construction is repugnant to the express language of the will, which declares that, upon the death of Harry J., such trustee was "to convey the said trust estate to his issue *then* living in fee, or, in case he shall die without issue, then and in that case the same to descend to my heirs at law *then* living in fee." "Issue then living" manifestly means living when Harry J. should die, and the words following, that, in case Harry J. should "die without issue," clearly mean such issue as had just been mentioned as "then living."

The same counsel contends that the trust sought to be created by the devise in question was unauthorized and prohibited by law, and vested a legal estate in Harry J. Webber for life; that it was at most a dry or passive trust, and

such as had been abolished by statute,—citing secs. 2073–2075, Stats. 1898, and *Sullivan v. Bruhling*, 66 Wis. 472; *Hannig v. Mueller*, 82 Wis. 235; *Tyson v. Tyson*, 96 Wis. 59. The difficulty with such contention is that the clause of the will, as we construe it, does not come within the statutes or decisions cited. The devise in trust did not entitle Harry J. "to the actual possession of the lands and the receipt of the rents and profits thereof," as provided in the first of these sections; nor was it "intended" thereby to vest in Harry J. "the right to the possession and the profits," as provided in the last of these sections. The statute expressly provides that such sections are not to "be construed to prevent or affect the creation of such express trusts as are . . . authorized and defined" in the chapter on uses and trusts. Sec. 2076, Stats. 1898. One of the sections of that chapter provides that "express trusts may be created for," among other things: "(3) To receive the rents and profits of land and apply them to the use of any person during the life of such person or for any shorter term, subject to the rules prescribed in the last preceding chapter. . . . (5) For the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time" therein expressed. Sec. 2081. See, also, secs. 4025–4027. The statute also provides that "every express trust, valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustees, subject only to the execution of the trust; and the person for whose benefit the trust was created shall take no estate or interest in the lands, but may enforce the performance of the trust." Sec. 2086. Harry J. had no power to assign or dispose of his interest in the rents and profits of the lands. Sec. 2089.

The trust in question was clearly authorized by the statutes cited, and is not repugnant to the "limitations as to

time" mentioned. The statute fixing such limitations, as it existed at the time of the death of the testator, declared that "the absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of two lives in being at the creation of the estate," except as therein stated. Sec. 2039, R. S. 1878. Here, as held in the former case, the clause in question "only ties up said estate so devised in trust during the life of said Harry J., and hence is not repugnant" to that statute, "but is a valid trust." Here there is no devise to Harry J. and his issue, nor to Harry J. for life and after his decease to his issue, and hence the argument that the devise in trust created an estate tail is, in our judgment, without foundation. Counsel contends that estates tail are not abolished in this state, but exist as at common law, and that the effect of such an estate, under the statute cited, "is to vest the same, by operation of law, in fee simple in Harry J. Webber and his heirs and assigns." Sec. 2027, Stats. 1898. But the difficulty with such contention is that Harry J. was never "seised in fee tail of any lands . . . by virtue of" such devise, and hence he cannot, under that section of the statute, "be deemed and adjudged to be seised thereof as an allodium." *Id.; Wight v. Thayer*, 1 Gray, 284; *Bone v. Tyrrell*, 113 Mo. 175; *Ray v. Alexander*, 146 Pa. St. 242. Besides, another section in the same chapter of our statute declares that "when a remainder shall be limited to take effect on the death of any person without heirs, or heirs of his body, or without issue, the words 'heirs' or 'issue' shall be construed to mean heirs or issue living at the death of the person named as ancestor." Sec. 2046, Stats. 1898. As stated, Harry J. left no "heirs of his body" nor issue. The mere fact that Harry J. had a little daughter who died nearly a year before his death did not convert his contingent equitable interest into a legal estate.

The clause in the will of William A. Webber, so creating

a devise in trust, is clearly distinguishable from the provisions of any of the wills construed by this court in the cases cited by counsel for the appellant. It is also distinguishable from the provisions of the will construed in *Patton v. Ludington*, 103 Wis. 629, in which the cases so cited are reviewed. We must hold that Harry J. was never seised of the fractional share of the lands so devised in trust, and hence that such lands could not pass from him to his widow, the appellant herein. The appellant's only claim here made to the lands so devised in trust is by virtue of the clause in the will of William A. Webber, quoted above, and the appeal herein is only from the disallowance of such claim. This being so, no part of the will of Mary H. Webber, or the will of Harry J. Webber, is before us for construction or consideration. In other words, the decision in this case is limited to such devise in trust.

By the Court.— The judgment of the circuit court is affirmed.

BARDEEN, J., took no part.

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108 632
117 467

IN RE WILL OF HEALY: O'SHEA and another, Appellants, vs. O'SHEA, Respondent.

December 14, 1900 — January 8, 1901.

Wills: Contest: Costs on appeal.

In a will contest, if the contestant has acted in good faith and the questions of law or fact are worthy of consideration, costs taxed against him in the supreme court should be paid out of the estate.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *Kellogg & Carbys.*

E. M. McVicker, for the respondent.

WINSLOW, J. This is a will contest. Ann Healy, an old woman, made her will, in which she practically disinherited three of her children and gave her property, consisting of real estate worth about $4,000, to the other two. All the children were adults, and the three who were disinherited had lived away from home for many years. The objections made to the will were that the testatrix was not of sound mind and that the will was the result of undue influence. The county court of Milwaukee county sustained the objections of the contestants, and refused to probate the will. Upon appeal to the circuit court, a new trial was had and the judgment of the county court reversed, and the will was adjudged to be the last will and testament of the deceased. It is now claimed that the findings of the circuit court are not supported by the evidence.

We have examined the evidence, and find it entirely sufficient to sustain the findings and judgment of the circuit court. As the questions involved are purely questions of fact, it seems needless to rehearse the evidence.

The circuit court awarded costs against the contestants, and we cannot say that there was any abuse of discretion in so doing. As to statutory costs in this court, the rule is that "if the contestant has acted in good faith, and the questions of law or fact are worthy of consideration, costs taxed against him should be paid out of the estate." *In re Donges's Estate*, 103 Wis. 497–514. The appeal here seems to have been taken in good faith, and we are unable to say that the questions of fact were not worthy of consideration.

By the Court.— Judgment affirmed, with costs to be taxed and paid out of the estate.

BARDEEN, J., took no part.

KICKBUSCH and others, Appellants, vs. CORWITH and others, Respondents.

September 8, 1900 — February 1, 1901.

Debtor and creditor: Fraudulent conveyances: Mortgage kept from record by agreement: Voluntary assignment: Pleading: Laches: Delay in bringing suit: Sales by mortgagees in possession: Accounting: Lis pendens: Bona fide *purchaser from fraudulent grantee.*

1. The parties to a mortgage of real estate agreed in writing that it should not be recorded except in case of default in the payments or the death of either party, the reason being that if recorded it would injure the credit of the mortgagor in his business. The agreement was observed for more than four years, during which time various persons gave the mortgagor credit on the faith of his apparent ownership of the property, with no knowledge of the mortgage. *Held*, that the mortgage was fraudulent and void as to the creditors so deceived.
2. A finding of the trial court to the effect that certain mortgages of real estate and of chattels and a transfer of corporate stock, by an insolvent debtor, were all made in good faith, to secure a *bona fide* indebtedness, and with no intent to defraud or delay creditors, is *held* to be sustained by the evidence.
3. An agreement between an insolvent debtor and two of his principal creditors, and transfers made by and pursuant thereto, constituting parts of the same transaction, whereby he transferred to them the greater part of his property, real and personal, and they assumed the management of his business, in order to prevent a sacrifice of his property, and for the purpose of paying in a specified order their claims and the judgments and liens of other creditors, with provision for the reversion of any surplus to the debtor, are *held* to have constituted a voluntary assignment for the benefit of creditors, which, although not tainted with actual fraudulent intent, was constructively fraudulent and void as to creditors because not executed as the statute (sec. 1694, Stats. 1898) requires.
4. Such transfers may be set aside in an action by judgment creditors of the insolvent, although their complaint does not specifically charge that the transaction constituted an unlawful voluntary assignment, where it alleges generally that all the transfers were executed as parts of one transaction, with the intent and purpose of having all the property held in trust for the use and benefit of the debtor contrary to law.

5. Such agreement never having been recorded and not having come to the knowledge of the creditors attacking it until three or four years after its execution, up to which time there was nothing to inform them that the transferees were in possession in any other capacity than as mortgagees under prior valid and recorded mortgages, and reasonable diligence having been used thereafter in ascertaining the facts of the numerous transactions involved, a delay of nearly five years after the agreement was made before the commencement of the action is *held* not to have constituted laches which would bar the action.
6. The fact that the transfers made by and pursuant to such fraudulent agreement were void did not avoid prior valid mortgages of the same property to the transferees, and, the agreement being set aside, they are restored to their legal rights under such mortgages.
7. The mortgagees in such case having disposed of the mortgaged property pursuant to the void agreement, the plaintiffs are entitled to an accounting from them, to the end that the equity of redemption may be reached and applied to the satisfaction of plaintiffs' judgments.
8. A finding of the trial court to the effect that the mortgagees had managed the property in the ordinary way of business and had made a *bona fide* effort to obtain as much as possible therefor, and that the net proceeds were insufficient to pay their claims, is *held* not conclusive, it appearing that both the debtor and the mortgagees supposed, at the time of the transfers, that the property was worth more than said claims and that a substantial surplus would be left for the debtor, and it further appearing that on the trial the parties agreed that it would be premature to go into a detailed accounting until the right thereto was settled, and that therefore no accounting was in fact had and very little testimony introduced.
9. The action being in equity and defendants, the mortgagees, not being chargeable with actual fraudulent intent, equitable principles must prevail in the accounting. Defendants should have credit for sums necessarily paid to preserve the property and relieve it from liens, as well as expenditures reasonably and necessarily incurred in the diligent management of the business, but should not have credit for any sums paid to the mortgagor out of the proceeds of the business unless he actually earned the same by services rendered for defendants in the proper management of the business.
10. A notice of *lis pendens* is constructive notice only of the proceedings in the action in which it is filed and of the rights of the parties to that action.

11. Actual knowledge that one judgment creditor of an insolvent has brought action to set aside as fraudulent a conveyance by the debtor does not, as matter of law, prevent the person having such knowledge from becoming, as against other creditors of whose claims he has no notice, a purchaser in good faith from the debtor's grantee.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Reversed as to a part of the defendants; affirmed as to the others.*

This is an action in equity by the plaintiffs, as judgment creditors of one *J. E. Leahy*, to set aside as fraudulent a number of mortgages, deeds, and other transfers of real and personal property made by *Leahy*. The transactions involved were numerous, and the testimony voluminous; but the dispute was principally as to the proper legal inferences to be drawn from the facts, rather than as to the facts themselves. The following facts were substantially undisputed;

This action was commenced September 6, 1895. The plaintiffs are creditors of *J. E. Leahy* in various amounts, aggregating more than $20,000, whose claims accrued in or about the years 1889 and 1890, and whose judgments were entered at various times between December, 1890, and April, 1896. Some of the judgments were not obtained until after the commencement of this action, and the parties were brought into this action on motion before the trial. Executions had been issued and returned unsatisfied upon most of the judgments prior to the commencement of the action.

In 1886, and for some years prior, the defendant *J. E. Leahy* and one M. P. Beebe, as partners, were doing a general lumbering and logging business at Wausau, Wisconsin, owning and operating a sawmill with a capacity of eight or ten million feet per year. The title to the mill was not in the firm, but each partner had title to an undivided half interest therein. In addition to the firm business, *Leahy* also

carried on an individual logging and lumbering business, his logs being manufactured into lumber at the same mill. Henry Corwith, deceased, of Chicago, was a capitalist, of whom both *Leahy* individually and the firm of Leahy & Beebe borrowed large sums of money for business uses in and prior to the years 1885, 1886, 1887, and 1888, giving security therefor by way of mortgages and contracts, assigning logs or lumber as security. One John Ross, of Galena, Illinois, was Corwith's agent, who negotiated these loans, and had some interest in the profits of such loans, and was frequently at Wausau. January 19, 1886, *Leahy* owed Corwith on previous loans $31,215.49, and gave his note therefor. January 21, 1886, *Leahy* made a contract with Corwith, through Ross, to borrow $20,000 additional,—the money to be advanced at intervals during the year,—and gave a mortgage on the undivided half of the mill property therefor; and a written agreement was also made that this mortgage should not be recorded, except in case of default in the payments or the death of either party. Further loans were made by Corwith to *Leahy*, of $10,000 January 8, 1887, and of $10,000 March 22, 1888, both secured by contracts giving logs as security; and for the loan of January 8, 1887, 143 shares of stock of the Wausau Boom Company were assigned to Corwith as collateral security. None of the agreements above referred to were recorded or filed, except the mortgage upon the mill, which was recorded at a later period, as hereinafter stated. On the 15th of September, 1888, Henry Corwith died testate, leaving the defendants *Charles R. Corwith* and *John Corwith* his executors, who duly qualified.

On December 26, 1888, *Leahy* owed *James McCrossen* $15,000 for goods purchased at *McCrossen's* store in Wausau, which amount was afterwards increased. In July and September, 1890, *Leahy* purchased pine timber of *McCrossen* on credit, amounting to $31,500, and *McCrossen* was also liable

as indorser on *Leahy's* notes for $20,500, making *Leahy's* total indebtedness to *McCrossen* in November, 1890, $73,760. November 13, 1890, *McCrossen*, who was then residing and in business in Ashland county, came to Wausau and demanded security of *Leahy* for his indebtedness, and *Leahy* gave him a mortgage on a large amount of lands in Price, Lincoln, and Oneida counties; also a chattel mortgage on his horses, oxen, sleds, and camp outfits in the woods; also a mortgage on lands in Marathon county. These mortgages covered the great bulk of *Leahy's* property outside of the mill, but not quite all of it. *McCrossen* then left Wausau, having recorded his mortgages, and returned to Ashland county.

On November 18, 1890, *Leahy* sent the following letter to *Charles R. Corwith*, at Chicago: "*Charles R. Corwith*, Esq., Chicago, Ill.—Dear Sir: I am not satisfied with the way my affairs are running, and would therefore advise you to send that mortgage against the mill here at once and have it recorded. Don't delay this matter. Send by first mail to register of deeds, Wausau, Wisconsin. Yours truly, *J. E. Leahy*." *Leahy* then owed the Corwith estate about $60,000, for which it had as security the unrecorded mortgage on the mill for $20,000, referred to in the letter, and the various contracts above referred to. *Charles R. Corwith* immediately came to Wausau, placed the real-estate mortgage on record, and saw *Leahy*. He then first learned, as the court finds, of the large indebtedness to *McCrossen*, and also of *McCrossen's* mortgages. He asked for security, and obtained, November 21, 1890, a second mortgage upon the real estate mortgaged to *McCrossen*, and recorded the same. On the following day he purchased of *Leahy* and Leahy & Beebe 250 shares of Wausau Boom Company stock at eighty-eight cents on the dollar, amounting to $11,000, and agreed to apply the same on the indebtedness of *Leahy* and Leahy & Beebe, and returned to Chicago.

Affairs remained in this situation until December 1, 1890, when a meeting was held at Wausau between *Leahy*, *McCrossen*, *Charles R. Corwith*, Ross, also Mr. Alexander Stewart and Mr. W. C. Silverthorn, and a conference had as to *Leahy's* affairs. As a result of this meeting an agreement was executed on the following day known as the "Tripartite Agreement." This agreement was signed and acknowledged by *McCrossen*, *Charles R. Corwith*, and by *J. E. Leahy* and his wife, and, after reciting the indebtedness to *McCrossen* and *Corwith*, and the various securities which had been executed therefor, proceeds as follows:

"And whereas, all the parties to this instrument have agreed, and do hereby agree, that the said property, both real and personal, shall be so managed as to yield the greatest amount available therefrom, by carrying out the plans of operation in the logging and lumbering business already begun for the present season, so as not to sacrifice thereon by disposing of the same immediately or by forced sales; and whereas, said *James McCrossen* has not ready means to carry on such operation: Now, therefore, for a consideration of the mutual promises and understanding herein contained, it is hereby agreed that the said *Charles R. Corwith* shall and have immediate possession of all of the said property, both real and personal, on following terms and conditions, namely: The said *Charles R. Corwith* shall continue on with the operations of logging and lumbering already begun, and shall furnish necessary means and funds necessary therefor; and the said *James McCrossen* shall have the general supervision and control of such operations for the present time until the logs and timber put in and to be put in, in all of the several camps, shall be logged, put in, driven, sawed and manufactured into lumber, and piled. The said *Charles R. Corwith* shall dispose of all of the said property in such a way and upon such terms as will bring the greatest amount for all parties concerned under that contract, in so far as

his judgment shall dictate and improve (*sic*), under the terms, conditions, and the intentions of the parties expressed and set forth in this instrument; and the proceeds thereof shall be applied by the said *Corwith* upon the following named indebtedness and advances, and in order as follows:

"*First.* For the said payment of the five last-named promissory notes mentioned in the list of notes in the indebtedness of said *J. E. Leahy* to said *James McCrossen*, amounting in the aggregate to twenty thousand five hundred dollars, with interest thereon.

"*Second.* The said payment and reimbursement to the said *Charles R. Corwith* for all the funds and moneys to be advanced and paid by him from this time forward in carrying on said logging and lumbering business, as hereinbefore set forth, together with interest thereon at the rate of eight per cent. per annum, and including any and all funds which may be necessary for him to advance to discharge any and all taxes, judgments, and liens upon any or all of the property mentioned in any of the said securities which may be prior thereto, and including any and all taxes which may be necessary to pay hereafter upon any of the said property before the same is disposed of.

"*Third.* Payment of the said indebtedness of the said *Leahy* to the said *McCrossen* as hereinbefore set forth and not already provided for, by the payment of the said five notes, amounting to twenty thousand five hundred dollars ($20,500), and interest, as aforesaid.

"*Fourth.* To the payment of the said indebtedness of the said *J E. Leahy* to said *Charles R. Corwith*, hereinbefore mentioned and set forth.

"*Fifth.* The payment to the said *J. E. Leahy*, or his representative and assigns, of any surplus which may remain after their imbursement and payment hereinbefore provided for.

"And it is further agreed that the said *McCrossen* shall

furnish the said *Corwith* regular reports of the operations, moneys received and disbursed thereon, and of the conditions of said operations, and the said *McCrossen* shall be allowed and paid a reasonable amount for his services according to the time actually devoted thereto. And it is further understood and agreed that said *McCrossen* and the said *Charles R. Corwith* may each take for themselves such of the said property hereinbefore mentioned and referred to as they may agree upon, to be applied upon their several sums of indebtedness, respectively, at a fair and reasonable valuation and price therefor.

"And in consideration of the premises the said *J. E. Leahy* does hereby grant, sell, transfer, and quitclaim to said *James McCrossen* and *Charles R. Corwith*, and to their, and each of their, heirs, executors, representatives, and assigns, all his (the said *J. E. Leahy's*) right, title, claim, and interest whatsoever in and to all and each and every piece and parcel of the said real estate mentioned in the said several mortgages, securities, and instruments. Likewise the said *J. E. Leahy* hath and doth hereby sell and transfer to the said *James McCrossen* and *Charles R. Corwith* all and each and every piece of personal property mentioned and referred to in the said documents. And, for the purpose of the conveyance of said real-estate property above referred to, *Mary D. Leahy*, wife of said *J. E. Leahy*, joins with her husband in the signing and execution of this instrument, and conveys all her right, title, and interest in said property to the same grantees aforesaid."

This agreement never was recorded. Upon the following day (December 3, 1890) *Leahy* and wife deeded to *Charles R. Corwith* the undivided half of the sawmill for the agreed price of $15,000, which was to be applied on *Leahy's* indebtedness to the Corwith estate. A part of the Beebe interest in the mill had been acquired by the Corwith estate before this time, and immediately *McCrossen* and Corwith

took possession of the mortgaged property, and for two years logged the mortgaged lands, driving the same to the mill aforesaid, and manufactured the same into lumber and sold it; *Corwith* advancing the necessary money to carry on the business, and to pay taxes, judgments, and prior liens referred to in the tripartite agreement. *Corwith* received the money for lumber sold in the business, and at the close of the second year's business he first paid the notes of $20,500 on which *McCrossen* was indorser. Then he paid the moneys advanced by himself for expenses of the business and the discharge of taxes, judgments, and prior liens, after which there was left in his hands $2,052.62 in money, together with some of the mortgaged property still remaining unsold, all of which he turned over to *McCrossen*. *McCrossen* applied the $2,052.62 on his indebtedness, sold the remaining property from time to time, and realized therefrom about $6,000, making $8,070.73, which he indorsed on *Leahy's* notes. *McCrossen* also, by agreement with *Leahy*, took back some scattering uncut pine timber which he (*McCrossen*) had sold *Leahy* on credit, and allowed him $8,000 therefor upon his indebtedness. He also foreclosed the mortgage on the Marathon county lands, and realized $1,763.87 on sale thereof, and there remained due him over $35,000 after all said securities had been exhausted.

In February, 1893, the sawmill was sold to the defendant *The Jacob Mortenson Lumber Company*, and *Corwith* received $6,000 on such sale for the undivided one-half thereof deeded to him by *Leahy*, December 3, 1890. The *Mortenson Lumber Company* had no actual notice of any defect in *Corwith's* title, and it went into immediate possession of the mill, and made extensive improvements therein at large expense prior to the commencement of this action.

Leahy was unquestionably hopelessly insolvent when the mortgages and conveyances of November and December, 1890, were made. On November 21, 1890, *Leahy* also owned

an undivided one-half of six city lots in Wausau, the other half being owned by the defendant *M. A. Leahy;* and on that day he deeded his interest in the lots to the defendant *Henry G. McCrossen*, and received *McCrossen's* note for $800 in payment therefor, which note was never paid. *Leahy* afterwards transferred the note to his wife, *Mary D. Leahy*, for $800 (which sum, however, was not shown to have been derived from her separate estate); and in March, 1894, *Henry G. McCrossen* deeded the lots to *Mary D. Leahy*, and took back his note. *Mary D. Leahy* afterwards conveyed the lots to various innocent purchasers, and received the proceeds of such conveyances.

The plaintiffs attacked as fraudulent the original mortgage on the mill given by *Leahy* to Corwith in 1886, the deed of the same of December 3, 1890, and the subsequent deed to the *Mortenson Lumber Co.;* also the transfer of the boom stock to *Charles R. Corwith;* also the mortgages, both real and chattel, made by *Leahy* to *McCrossen* and *Corwith* in November, 1890; also the tripartite agreement of December 2, 1890; also the transfer of the city lots to *Henry G. McCrossen* November 21, 1890. The court, however, found that all the transactions attacked were entered into in good faith and were free from fraud, and that the complaint should be dismissed as to all the defendants, except as to the defendant *Mary D. Leahy*, and that as to her the plaintiffs might, if they desired, have a judgment requiring her to account for any part of the proceeds of sales of the city lots which was still in her hands. Judgment was entered in accordance with the findings, and the plaintiffs appeal.

For the appellants there were briefs by *Brown & Pradt*, *Mylrea & Bird*, and *Thompson, Harshaw & Thompson*, and oral argument by *Neal Brown*, *C. B. Bird*, and *J. C. Thompson*. As to the effect of withholding a mortgage from record in order to give credit to the mortgagor, they cited *Blennerhassett v. Sherman*, 105 U. S. 100; *Coates v. Gerlach*,

44 Pa. St. 43; *Hilliard v. Cagle*, 46 Miss. 309; *Hafner v. Irwin*, 1 Ired. Law, 490; *Hildeburn v. Brown*, 17 B. Mon. 779; *Neslin v. Wells*, 104 U. S. 428; *Jewett v. Sundback*, 5 S. Dak. 111; *Liddel v. Allen*, 90 Iowa, 738; *Bunch v. Schaer*, 66 Ark. 98; *Francis v. Lawrence*, 48 N. J. Eq. 508; *Montgomery v. Phillips*, 53 N. J. Eq. 203; *State to use Meyer v. O'Neill*, 151 Mo. 67; *Thompson Nat. Bank v. Corwine*, 89 Fed. Rep. 774; *Steele v. Coon*, 27 Neb. 586; *Fetters v. Duvernois*, 73 Mich. 481; *State S. Bank v. Buck*, 123 Mo. 141; *Central Nat. Bank v. Doran*, 109 Mo. 40; *Adams v. Curtis*, 137 Ind. 175; *Lehman, Durr & Co. v. Van Winkle*, 92 Ala. 443; *Pendleton v. Hughes*, 65 Barb. 136. That the tripartite agreement constituted a voluntary assignment and was void: *Winner v. Hoyt*, 66 Wis. 227; *Collins v. Corwith*, 94 Wis. 514; *Sweet, Dempster & Co. v. Neff*, 102 Wis. 482; *Strong v. Kalk*, 91 Wis. 29; *Maxwell v. Simonton*, 81 Wis. 635; *Fuller & Fuller Co. v. McHenry*, 83 Wis. 573; *Northern Nat. Bank v. Weed*, 86 Wis. 212; *Jameson v. Maxcy*, 91 Wis. 563; *Dahlman v. Greenwood*, 99 Wis. 163.

For the respondents there was a brief by *Ryan, Hurley & Jones*, and oral argument by *M. A. Hurley* and *T. C. Ryan*. As to the right of a creditor to take security from an insolvent debtor, they cited *Menzesheimer v. Kennedy*, 75 Wis. 411; *Cribb v. Hibbard, S., B. & Co.* 77 Wis. 199; *Michelstetter v. Weiner*, 82 Wis. 298; Stats. 1898, secs. 2320, 2323, 2324; *Gillett v. Phelps*, 12 Wis. 392; *Bleiler v. Moore*, 94 Wis. 385; *Hyde v. Chapman*, 33 Wis. 391; *Hoey v. Pierron*, 67 Wis. 262; *Barker v. Lynch*, 75 Wis. 629; *Erdall v. Atwood*, 79 Wis. 7; *Second Nat. Bank v. Merrill*, 81 Wis. 149, 150; *Kaufer v. Walsh*, 88 Wis. 63; *Kapernick v. Louk*, 90 Wis. 234; *Leisen v. Roberts*, 80 Wis. 572; *Darland v. Rosencrans*, 56 Iowa, 122; *Ingram v. Osborn*, 70 Wis. 192; *Greene & B. Co. v. Remington*, 72 Wis. 654; *Mehlhop v. Pettibone*, 54 Wis. 657; *Norwegian P. Co. v. Hanthorn*, 71 Wis. 536; *Mendelson v. Paschen*, 71 Wis. 593; *Carey v.*

Dyer, 97 Wis. 554; *Cunningham v. Eagan*, 102 Wis. 272. Even when mortgagees have knowledge of a creditor's intent to hinder or delay creditors, that alone does not make their securities invalid. *Koch v. Peters*, 97 Wis. 492; *Carey v. Dyer*, 97 Wis. 554; *H. B. Claflin Co. v. Grashorn*, 99 Wis. 356; *Bleiler v. Moore*, 94 Wis. 385.

WINSLOW, J. A previous creditors' bill seeking to set aside as fraudulent the mortgage and subsequent deed of *Leahy's* half of the sawmill property was before this court in the case of *Collins v. Corwith*, 94 Wis. 514. It was there held, in accordance with the decision of the trial court upon evidence less full than that now before us, that the mortgage was fraudulent as to creditors, because withheld from record for years pursuant to agreement of the parties, for the purpose of giving *Leahy* a false financial standing, and that the deed of December 3, 1890, to *Charles R. Corwith* was simply one part of an entire transaction which constituted an assignment for the benefit of creditors and was void because not executed as required by law; following the rule laid down in *Winner v. Hoyt*, 63 Wis. 227, and subsequent cases along the same line.

While this former decision is in no sense *res adjudicata* in the present case, it concerns the same transaction, and is founded upon much the same evidence, and is entitled to considerable weight. Certainly, if a different conclusion is now to be reached, it should be because a substantially different case is presented by the evidence. Instead of this, however, the evidence now before us makes the fraudulent character of the mortgage in 1886 plainer than before. The agreement not to record the mortgage was made in writing. It was observed for more than four years. The reason was, according to *Leahy's* own statement, that if recorded it would injure his credit in the matter of hiring men and teams in the woods and at the mill. The reason given is

an entirely consistent and probable one, and in fact about the only probable reason for such a course. The testimony of the various plaintiffs shows that they gave *Leahy* credit on the strength of his apparent ownership of the mill, and that they had no knowledge of the mortgage. We perceive no escape from the conclusion that the mortgage was withheld from record by agreement of the parties for the very purpose of giving *Leahy* a false financial standing, and to deceive persons dealing with him, and hence was, under well-settled principles, fraudulent as to creditors so deceived. *Blennerhassett v. Sherman*, 105 U. S. 100; *Collins v. Corwith*, 94 Wis. 514; *Evans v. Laughton*, 69 Wis. 138.

This mortgage, then, being void as to the plaintiffs, we come next to the consideration of the real-estate and chattel mortgages of November 13 and 21, 1890, to *McCrossen* and *Corwith*, and the transfer of the boom stock of November 22, 1890. While the consideration for these transfers was attacked in the plaintiffs' complaint, the evidence showed beyond dispute that the indebtedness which they were given to secure was *bona fide*, and the court so found. The court also found that these mortgages and transfers were all made in good faith and with no intent to defraud or delay creditors. While it may be true that there was evidence in the case pointing to a different conclusion, still we are unable to say that the conclusion reached by the court is against the clear preponderance of the evidence. The facts that the mortgages were made to secure *bona fide* debts; that the creditors had a right to collect or secure such debts, even though *Leahy* was insolvent; that they at once recorded their mortgages,—are all cogent facts in favor of the conclusion reached by the trial court, and doubtless had great weight. For the reasons already stated, we are compelled to affirm the conclusions of the trial court as to the validity of the transactions of November 13, 21, and 22, 1890, including the transfer of the boom stock.

But, whatever hope *Leahy* may have had in November of continuing his business and discharging his obligations in the usual way, that hope evidently disappeared when he arranged the meeting of December 1st following. This meeting was attended by *Corwith*, Ross, *McCrossen*, *Leahy*, and two friends of *Leahy*. At this time it was recognized by all that *Leahy's* affairs were in such a desperate situation that he could continue business on his own account no longer; and the question presented was, how could the business be conducted, and *Corwith* and *McCrossen* paid, and have something left for *Leahy*. Large advances of money would be necessary, and it was evident that *Corwith* was the only person who was able to make the advances. The result of this conference was the execution of the tripartite agreement, and the deed of the undivided half of the mill property to *Corwith*. That the execution of the deed last named was part and parcel of the transaction is to us clearly evident from the testimony, although the trial court found that it was an independent transaction. Every indication points to the conclusion that the whole transaction was one,— the situation of the parties, the problem which they were endeavoring to solve, the joining of both interests in the tripartite agreement, the close proximity in point of time, and many other facts too numerous to mention in detail. Again, *Leahy* so testified upon the trial of the *Collins and Corwith Case*, and, although he changed his testimony somewhat upon the present trial, he was obliged to admit substantially in this case that the deeding of the mill was part of the talk; and, while both *Leahy* and *Corwith* now deny that it was agreed that *Leahy* should have the mill back after the *Corwith* debt was paid, they both admit that it was understood that he (*Leahy*) should have the first chance to purchase it, but no price was fixed.

Giving the testimony all reasonable weight so far as it tends to support the conclusion of the trial court on this

point, we still conclude that the overwhelming weight of the direct evidence as well as of the circumstantial evidence shows that the transactions of December 1st, 2d, and 3d were all one. Reaching this conclusion, there can be no doubt of the legal inference which must follow, and that is that the entire transaction constituted a voluntary assignment for the benefit of certain creditors, which is void because not executed as the statute requires. The terms of the tripartite agreement are too plain to admit of reasonable controversy on this point. There was a transfer of some, though not all, of the debtor's property. There were certain trusts named in the transfer. There were trustees. There were creditors besides *Corwith* and *McCrossen* to be paid, namely, the holders of judgments and liens and tax claims. There was provision for the reversion of the surplus to *Leahy*. This combines all the elements of a voluntary assignment. It was not necessary that all of the debtor's property should be conveyed. *Jameson v. Maxcy*, 91 Wis. 563.

But it is said that the transaction was not attacked on this ground in the complaint, but only on the ground of actual fraud, and hence that it cannot be set aside, even if it be in violation of the assignment law, because no such issue has been raised. While the complaint does not charge in so many words that the transaction constituted an unlawful voluntary assignment, it sets forth the tripartite agreement in full, and contains the general allegation that all the said transfers were executed as parts of one transaction, with the intent and purpose of having all the property *held in trust* for the use and benefit of said *Leahy contrary to law;* and we think this allegation amply sufficient to cover the proposition.

The transfers of December 2 and 3, 1890, were therefore constructively fraudulent and void as to creditors, although not tainted with actual fraudulent intent. But it is said that by delaying the commencement of this action for nearly five

years after the transfer, during which time the property has been sold and disposed of, the plaintiffs have been guilty of laches which should equitably bar this action. The argument would be strong, had the plaintiffs had any knowledge or means of knowledge of the character of the transaction of December 2 and 3, 1890. The tripartite agreement was never recorded. The deed of the undivided half of the mill was recorded, but contained no hint of the real transaction. It is true that the defendants *McCrossen* and *Corwith* were in possession of the real and personal property mortgaged in November, 1890, but they had recorded mortgages covering such property, and there was nothing to inform the plaintiffs that they were in possession in any other capacity than as mortgagees. The tripartite agreement did not become known to any of the plaintiffs until it came out in the course of the testimony of *Mr. Leahy* taken in the case of *Collins v. Corwith*, some time in the year 1893 or 1894. At that time, of course, the *Collins Case*, involving similar issues, was as yet undecided. After the discovery was made, reasonable diligence seems to have been used in the commencement of this action. The number of transactions involved, the difficulty of obtaining facts in the control of adverse parties, and the fact that both *Charles R. Corwith* and *John Corwith* were nonresidents of the state and rarely here, all tended to embarrass and delay the plaintiffs in commencing their action; but it was finally commenced in September, 1895, and we cannot say that the delay constituted laches under the circumstances.

The fact that the transfers attempted to be made by the tripartite agreement are void does not, however, avoid the prior valid mortgages. The fraudulent agreement being set aside, the grantees are restored to their legal rights under the mortgages. Bump, Fraudulent Conveyances (4th ed.), § 484. From these conclusions it necessarily results that the plaintiffs were entitled to an accounting at the hands

of the mortgagees of the disposition made by them of the mortgaged property, to the end that the equity of redemption therein may be reached and applied to the satisfaction of the plaintiffs' judgments. But it is said that the court has found that this equity was of no value. It is true that there is a finding to the effect that sufficient evidence was introduced to prove the fact that the business was conducted in the ordinary way of business, and that *Corwith* and *McCrossen* made a *bona fide* effort to obtain from the property as much as possible over and above necessary expenses, and that the net proceeds were all applied towards the payment of the indebtedness to *McCrossen*, and it is a fact that such proceeds were insufficient for that purpose; but it further appears that the parties agreed that it would be premature to go into a detailed account of the moneys received or expenses incurred until after the question of the right to an accounting was settled, and that therefore no accounting was in fact had and very little testimony introduced. We cannot regard this summary disposal of the question upon mere general statements as to the manner of conducting the business as in any way conclusive or satisfactory. Such statements are easily made, and very intangible and hard to meet. The evidence showed that both *Leahy* and the mortgagees considered the property of greater value than the amount of the claims for which it was transferred, at the time the transfer was made, and that there would be a substantial residuum for *Leahy*. The plaintiffs are entitled to a full and fair accounting to ascertain what the facts are, and this they have not had.

It may not be wise or practicable to lay down exact rules in advance upon which the accounting is to be conducted, but, the action being in equity and the defendants not being chargeable with actual fraudulent intent, equitable principles must prevail. Generally it may be said that they will be chargeable with the property which they received, and

which has been retained by them without sale, at its reasonable value; and, as to such property as they have sold, they should be charged such sums as in a diligent prosecution of the business they realized, or ought to have realized, therefrom. Their duty certainly was to realize all from the property sold that could be realized by prudent business men in the course of a reasonably diligent management of the business. They will be entitled to credit for the sums necessarily paid to preserve the property and relieve it from liens, as well as the expenditures reasonably and necessarily incurred in the management of the business in the manner above stated. If, as the evidence seems to show, any sums have been paid to *Leahy* from the proceeds, they will not be entitled to credit therefor, unless it appear that *Leahy* actually earned the same by services rendered for the defendants in the proper management of the business. Under these general rules, it is not believed that there can be serious difficulty in the proper statement of the account.

As to the claim that the *Mortenson Lumber Company* purchased the undivided half of the mill with notice of the claims of the plaintiffs, and hence that their conveyance can be set aside in this action, we find no occasion to set aside the conclusions of the trial court in that regard, to the effect that said company purchased in good faith without notice. No claim had been made by any of the plaintiffs against this property at the time of their purchase. It is true that when the company purchased the property the Collins suit was pending, brought to set aside the Corwith mortgage and deed as fraudulent as against creditors, and that a *lis pendens* was then on file, and that their abstracts showed the filing of the *lis pendens*, describing the action as an action to set aside the mortgage. These facts the company's officers knew. The object of the Collins suit was simply to set aside the Corwith mortgage and deed to an extent sufficient to satisfy Collins's judgment against *Leahy*, amounting to

about $1,600. Of course, the *Mortenson Lumber Company* took the risk of any recovery in the Collins action, because they had actual notice of the pendency and purpose of the action, and their conveyance was recorded after the filing of the *lis pendens*. But (as the court found on sufficient evidence) they had no actual notice of any claims by these plaintiffs as to the property; and so the question is, Did the filing of the *lis pendens* in the *Collins Case*, or the actual knowledge of that case possessed by the company, constitute such notice of the possible claims of other possible creditors that they could not acquire a good title as against such creditors? We think this must be answered in the negative. The *lis pendens* itself is constructive notice only of the proceedings in the action in which it is filed, and of the rights of the parties to that action. Stats. 1898, sec. 3187; *Stout v. Philippi M. & M. Co.* 41 W. Va. 339.

Did the actual knowledge which the *Mortenson Company* had that Collins had brought action claiming that the *Corwith* deed was fraudulent as matter of law prevent the company from becoming purchasers in good faith? Certainly the fact was competent proof on the subject, and might, in connection with other facts, constitute notice which should have put the purchaser upon inquiry, but we do not think that it can be held conclusive. The fact that the company immediately spent at least $8,000 in improvements on the mill is a circumstance properly to be considered on the question of good faith, as well as the fact that they were advised by their attorneys who examined the abstract that the title was good. Upon the whole case we are unable to say that the finding of the court upon this question is erroneous. But *Corwith*, having received $6,000 for the undivided half of the mill upon sale thereof to the lumber company, and having no valid lien thereon or title thereto as against these plaintiffs, must be held liable to account for the same in this action, except for such part thereof, if any, as he has paid to discharge the Collins debt.

As to the transfer of the city lots to *Henry McCrossen*, we are unable to say that the conclusions of the trial court were contrary to the evidence. A discussion of the evidence on this point would scarcely be profitable.

By the Court.— As to the defendants *Corwith*, *James McCrossen*, and *J. E. Leahy*, the judgment is reversed, and the action remanded for further proceedings in accordance with this opinion, with disbursements and clerk's fees to be taxed against said respondents, but no attorney's fees. As to the remaining defendants the judgment is affirmed, without costs.

BARDEEN, J., took no part.

ROOSEVELT, Respondent, vs. LAND & RIVER COMPANY, imp., Appellant.

108 653
109 642

108 653
d116 243

October 30, 1900 — February 1, 1901.

(1, 2) *Service by publication: Affidavit: Time of making: Presumptions to support order.* (3) *Foreclosure of successive mortgages:* Lis pendens: *Parties: Right of possession.*

1. Under sec. 2640, Stats. 1898 (providing that the application for an order directing service by publication shall be based upon the complaint and an affidavit, "together showing the facts required to exist"), such facts must be shown to exist at the time the order is made, i. e. the order must follow the affidavit within a reasonable time. An affidavit made two weeks before the order, based in part on a sheriff's return filed six weeks prior, is *held* in this case not a sufficient foundation to support the order.
2. Sec. 2641, Stats. 1898, which makes the order presumptive proof of the existence of all facts required to exist, etc., does not apply in such a case, where the record shows that the order was made upon insufficient proof.
3. In an action to foreclose a second mortgage on land judgment was entered the day after the commencement of suit to foreclose the first mortgage, and before a notice of *lis pendens* had been filed in

the latter action, but the sale on said judgment took place after the filing of such notice. The holders of the second mortgage were not made parties to the action to foreclose the first mortgage. *Held*, that the purchasers at the sale on foreclosure of the second mortgage were not affected by the filing of the notice of *lis pendens*, but obtained the legal title and right to the possession of the land, and that the purchaser at the sale on foreclosure of the first mortgage obtained no possessory right as against such title.

APPEAL from an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

In the year 1890 Mrs. Vernam, the owner of the property in controversy, mortgaged the same to the Land & River Improvement Company, which mortgage was assigned to plaintiff. May 23, 1895, she conveyed the property to said company, subject to the mortgage. May 1, 1896, the company executed to Robert De Forest, Samuel E. Kilner, and George Sherman, as trustees, a trust deed of this and a large amount of other property to secure certain of its bonds. In 1896 a creditors' suit was commenced in the United States circuit court for the Western district of Wisconsin against said company by certain of its creditors, and such proceedings were had that said De Forest, Kilner, and one William B. Banks were appointed receivers. Said receivers duly qualified and took possession of all of said property. November 16, 1896, said trustees brought suit in said United States court against said company to foreclose such trust deed. The proceedings were afterwards amended so as to make Sherman plaintiff, and the other trustees defendants, as receivers. March 22, 1898, the plaintiff commenced this action to foreclose his said mortgage, naming said company and said trustees, receivers, and others, parties defendant. Said receivers were shown to be nonresidents of the state, and service was attempted to be made by publication. March 23, 1898, a decree of foreclosure was entered in the United States court in the action to foreclose the trust deed. April

23, 1898, *lis pendens* was filed in this action. May 12, 1898, a sale of the property included in the trust deed was made, by consent of parties, to H. W. De Forest. The sale was confirmed, and on June 20, 1898, the purchaser conveyed the premises in suit to the appellant, the *Land & River Company*, and possession was taken. November 9, 1898, judgment of foreclosure was entered in this action. February 21, 1900, a sale of the property under said judgment was had, and the plaintiff became the purchaser. Such sale was confirmed March 24th following.

On April 19th, upon an affidavit which set out the facts in relation to plaintiff's mortgage, the foreclosure and sale, and demand upon said *Land & River Company* for possession of the mortgaged premises, and a refusal to deliver such possession, the plaintiff procured an order to show cause why a writ of assistance should not issue. The *Land & River Company* made return to said order, setting out the proceedings to foreclose said trust deed, and its title thereunder, and denying the right of plaintiff to a writ of assistance, on the ground that no jurisdiction had ever been obtained of the trustees and receivers in this action. The particular grounds for its contention, among other things, were that service upon them was attempted to be made by publication, and that no sufficient affidavit or valid order for the publication of the summons was ever made, and that no sufficient proof of mailing the summons was ever filed. Copies of the files and proceedings in the United States court in said matter were made a part of said return.

Upon the hearing in the circuit court an order was entered directing that a writ of assistance should issue, giving the possession of the mortgaged premises to the plaintiff. From such order the *Land & River Company* has taken this appeal.

For the appellant there was a brief by *Sanborn, Luse & Powell*, and oral argument by *A. L. Sanborn*. They argued,

among other things, that the foreclosure of the trust mortgage having been completed in June, 1898, the title of the mortgagor, with the interest of the second mortgagee, became vested in the purchaser at the foreclosure sale, and the title vested, not as of that date, but as of the date of the execution and delivery of said second mortgage. Such must be the rule, otherwise intermediate liens and incumbrances, between the giving of a second mortgage and the foreclosure sale, would be prior in right to the title acquired by the foreclosure. In other words, the purchaser acquires all right and title which the mortgagor had at the time of the execution of the mortgage. 2 Jones, Mortgages, § 1654; *Ritger v. Parker*, 8 Cush. 145; *Carter v. Walker*, 2 Ohio St. 339; *Packer v. R. & S. R. Co.* 17 N. Y. 287; *Ames v. Storer*, 98 Wis. 372; 2 Pingrey, Mortgages, § 1974; Wiltsie, Mortgage Foreclosures, § 164. These authorities show clearly the difference between a purchase of the mortgagor's interest subsequent to the commencement of a foreclosure under a voluntary conveyance, and the obtaining of title by way of an adverse proceeding, by way of foreclosure of a mortgage or sale upon a judgment which was a lien before the filing of the notice of *lis pendens*. The cases of *Murphy v. Farwell*, 9 Wis. 102, and *Allen v. Case*, 13 Wis. 621, fully decide this question. The foreclosure of the first mortgage without making the second mortgagee a party passed to the first mortgagee nothing but his mortgage interest. *Tallman v. Ely*, 6 Wis. 257; *Stark v. Brown*, 12 Wis. 572, 584; *Frische v. Kramer's Lessee*, 16 Ohio, 136. The holder of a second mortgage recorded before a foreclosure is commenced upon the first mortgage, who acquires title by foreclosure proceedings, does not, within the meaning of our statute (secs. 3169, 3187, Stats. 1898), claim under the mortgagor *subsequent* to the filing of the notice of *lis pendens* in such foreclosure. He is not a purchaser *pendente lite* either at common law or under the statute. The court not hav-

ing acquired jurisdiction over the holders of the trust mortgage, and the appellant having acquired the title and right of possession under the foreclosure of said mortgage, it is entitled to retain the same until the plaintiff shall foreclose his mortgage in such manner as will cut off the interest so acquired.

For the respondent there was a brief by *Henry W. Gilbert* and *H. C. Sloan*, and oral argument by *Mr. Sloan*. They contended, *inter alia*, that the pendency of an action does not convert a mere mortgage lien into a fee until a sale and conveyance. Appellant was a mere mortgagee, and if respondent commenced his action and filed his *lis pendens* before appellant got his fee, appellant was a purchaser *pendente lite*. And it makes no difference that the title was obtained under judicial procedure. Wiltsie, Mortgage Foreclosures, §§ 130, 153, 163, 303-305; sec. 3167, Stats. 1898; *Warner v. Trow*, 36 Wis. 195; *Newton v. Marshall*, 62 Wis. 8.

The following opinion was filed November 16, 1900:

BARDEEN, J. Two propositions are to be considered on this appeal: (1) Did the plaintiff obtain jurisdiction of the trustees and receivers, so as to bind them by the judgment herein? (2) If not, who is entitled to the possession of said premises?

1. The order of publication was dated June 10, 1898, and was based upon the papers on file, and the affidavit of the plaintiff's attorney, dated May 27, 1898,— fourteen days before such order was made. To meet the requirements of sec. 2640, Stats. 1898, as to the diligence used in making service of the summons, said affidavit referred to the sheriff's return on file. Such return is undated, but appears to have been filed April 23, 1898. The point is made by appellant that an affidavit made fourteen days prior to the making of the order, the latter being based in part upon a return of the sheriff made six weeks prior, is not a sufficient founda-

tion to support an order for the publication of the summons. Sec. 2640 says that the application for such an order "shall be based upon the complaint, duly verified and filed, and an affidavit, together *showing the facts required to exist.*" The question is, When must the "facts required" be shown to exist? No decision of this court has been cited, and after diligent search none has been found, which throws any light on this question. In other states, however, under similar statutes we find decisions directly upon the point. Thus, in *N. Y. B. Union v. Atwell*, 95 Mich. 239, it is said: "An order of publication must be based upon facts existing at the time the order is made. The rule that, as matter of evidence, a fact in its nature continuous, being once shown to exist, will often be presumed to continue unless the contrary be shown, does not apply to the averment of a jurisdictional fact, which must appear as existing at the time the order is made." It was accordingly held that an affidavit of nonresidence made five days before the making of the order would not sustain it. See, also, *Adams v. Wayne Circuit Judge*, 98 Mich. 51. In *Forbes v. Hyde*, 31 Cal. 342, it is held that the facts must appear before jurisdiction to make the order attaches, that the making of the affidavit and the order must follow each other in reasonably quick succession, and that an order was not well supported by an affidavit made some four months before it was applied for. Following in line with this case, the same court, in *Cohn v. Kember*, 47 Cal. 144, held that a delay of fifteen days between the making of the affidavit and the application for the order could not be permitted. A brief discussion of the same question may be found in *Armstrong v. Middlestadt*, 22 Neb. 711, where the affidavit was made on March 5th, and the order on the following day, and the order was held good. In *Campbell v. McCahan*, 41 Ill. 45, an affidavit of nonresidence made twenty days before the bill was filed was held not made in a reasonable time before the suit was brought, and failed to confer jurisdiction. In

an attachment proceeding the affidavit was made August 2d, and was filed and the writ issued eleven days thereafter, and it was held that such delay was unreasonable. *Foster v. Illinski*, 3 Ill. App. 345.

The tenor of all these decisions is that the proceeding to obtain jurisdiction of a nonresident is statutory and must be strictly complied with. This court has so held, and the cases on this point may be found cited in *Beaupre v. Brigham*, 79 Wis. 436. Such being the rule, it is quite proper to say that the "facts required to exist," mentioned in the statute, must be shown to exist at the time the order is made. Not that the making of the affidavit and the order must follow in instantaneous succession. The two acts need not be simultaneous, but must follow each other in reasonably quick succession, and what is a reasonable time is to be judged by the situation of the parties. In this case the affidavit and order appear to have been made in Douglas county. As to the diligence used in making service, the affidavit refers to the sheriff's return filed six weeks prior to the order. No reason is given why there was a delay of two weeks between the making of the affidavit and the order. If he may delay two weeks, he may delay any number of weeks. This would not be in harmony with the spirit of the law or the intention of the legislature. We therefore hold that the record shows an unreasonable delay intervening the two acts necessary to confer jurisdiction, and that the order of publication had no sufficient basis to rest upon.

Counsel for the plaintiff suggests that the order must be held sufficient under sec. 2641, which makes it presumptive proof of the existence of all facts required to exist to authorize the same to be made, and conclusive in all collateral actions or proceedings. A sufficient answer to this claim may be found in *Manning v. Heady*, 64 Wis. 630, which holds that this section does not apply to a case where the record shows that the order was made upon insufficient or defective proof.

The claim that the attorneys for the trustees appeared, and thus jurisdiction was obtained, is too flimsy to require discussion. It requires something more to constitute an appearance in a case than a consultation of the attorneys of the parties, and a threat by one to appear unless the complaint is amended as to the claim against his clients.

2. The plaintiff never having secured jurisdiction over the holders of the second mortgage, we are left to consider the rights of the parties with reference to the mortgaged premises. The plaintiff insists that, because the fee or equity of redemption was still in the Land & River Improvement Company at the time his action was commenced and notice of *lis pendens* was filed, the holders of the second mortgage, or their grantees, obtained no right of possession under their foreclosure proceedings, except in subordination to his rights. If this is so, it must be upon the theory that the doctrine of *lis pendens* applies to and binds all parties who claim under the foreclosure proceedings in the United States court, and upon that theory the only right the appellant would have left to it is a right of redemption. It must be admitted that if the rule of *lis pendens* does apply, as claimed, then the conclusion reached by respondent is correct. But does it apply to appellant under the circumstances set out in the statement? Here are two separate and independent foreclosure sales, under two mortgages, both being in existence before suit was commenced upon either. The holder of the second mortgage brings the first suit, and a foreclosure judgment is entered the day after this suit was commenced, and before *lis pendens* was filed. In that suit the holder of the equity of redemption or legal title is made a party, and a sale is had a few days after the *lis pendens* was filed. At that sale there can be no doubt but that the purchaser obtained the legal title to the land, and all the interest of both the mortgagor and mortgagee therein, subject to the prior mortgage. Speaking on this subject in an early case, this

court said: "Whatever estate or title the mortgagee had in the mortgaged premises became merged in the decree, and passed to the purchaser at the judicial sale. Whatever estate or title the other parties to the sale had at its commencement passed by the same act to the same party. Such, it would seem, must be the necessary and inevitable consequence and result of the decree of foreclosure and sale, if any effect whatever is given to them." *Tallman v. Ely*, 6 Wis. 244. This principle is referred to and approved in the late case of *Ames v. Storer*, 98 Wis. 372. Hence it follows that by its deed from the purchaser at the foreclosure sale the appellant became invested with the legal title and right to possession of the mortgaged premises under a claim which existed prior to the time this suit was brought. The respondent having failed to make the holders of the second mortgage parties, as already determined, they were not barred or cut off by the proceedings in this action, unless, as respondent claims, they were cut off by the filing of the notice of the pendency of this action, under sec. 3187. This section says, "From the time of such filing, . . . the pendency of such action shall be constructive notice thereof to a purchaser or incumbrancer of the property affected thereby." The precise question here involved has been under consideration by this court in two cases. *Murphy v. Farwell*, 9 Wis. 102, and *Allen v. Case*, 13 Wis. 621. The reasons for the conclusions there reached are so fully and carefully stated that an attempt to add to the discussion would lead to no useful results. The substance of those decisions is that, when a sale of the mortgaged property takes place in pursuance of an interest in the property acquired before the suit was commenced in which the notice of *lis pendens* was filed, the purchaser at such sale is not within the rule of *lis pendens* unless he or the holder of the interest was a party to that suit. Whether this rule is in harmony with that established in other states, it is not our purpose to inquire.

It is the rule in this state, and no good reason is perceived why it should not be followed. It being determined that the rule of *lis pendens* does not apply to the appellant, it is clear that when the sale was made herein the entire interest of the mortgagor had passed to it under its deed from De Forest and hence no possessory right, as against its title, passed to the purchaser at plaintiff's sale.

Other questions are raised, but none of which is of sufficient importance to change the result reached, or to require extended discussion.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to the circuit court to discharge the order to show cause, and for further proceedings according to law.

A motion for a rehearing was denied February 1, 1901.

SANDERSON and others, Respondents, vs. HERMAN, imp., Appellant.

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108	662
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December 11, 1900—February 1, 1901.

Municipal corporations: Street improvements: Special assessments: Reassessment: Validity: Arbitrary assessment: Change of grade: Statutes: Constitutionality: Repeal and re-enactment: Trial on pleadings: Judgment.

1. A special assessment for a street improvement, which was held invalid because damages from change of grade were not determined at the same time, as required by the Milwaukee city charter, is within the purview of ch. 262, Laws of 1897, and secs. 1210*d*–1210*f*, Stats. 1898, providing for a reassessment when a special assessment is invalid "by reason of failure to observe any provision of law, or by reason of any act or defect in the proceedings upon which such special assessment . . . is based."
2. The certificate of the board authorized to make a reassessment that they viewed each lot and considered and determined, as to the

same, both the benefits and damages, costs, etc., less benefits resulting from change of grade, is not overcome by the mere fact that each lot of the same size is determined to have received the same benefit, especially when it appears that all the lots were used and affected substantially alike.

3. A statute (ch. 262, Laws of 1897, re-enacted in secs. 1210*d*–1210*f*, Stats. 1898) authorizing a reassessment when a special assessment is invalid, is not unconstitutional if it does not omit any requirement or condition which the legislature could not have dispensed with as prerequisite to the original assessment.

4. The declaration of the assessing board that a reassessment was made by them in compliance with ch. 262, Laws of 1897, which before the completion of their proceedings had been re-enacted in and superseded by secs. 1210*d*–1210*f*, Stats. 1898, is immaterial, where the proceedings complied with both acts, and each (whichever was in force) authorized them.

5. Whether, under the Milwaukee city charter, an attempted change of the established grade of a street by resolution, without any petition therefor, is of any force, and, if not of force, whether the city had power to improve the street to other than the old grade at the expense of lotowners, is immaterial, where there was practically no change in the actual grade, the increased elevation of the new pavement being very slight and only in the center of the street, and not involving expense in grading the street but, on the contrary, avoiding the expense of cutting it down for the new pavement.

6. Where a judgment recites that the cause came on for trial on defendant's answer, and the record discloses no objection to such trial, the appellate court will assume that the parties consented to treat the answer as the basis on which trial should be had, and stipulated that the answer was true, not only for the consideration of its sufficiency as a pleading, but also for the purposes of a trial.

7. Where parties submit a cause for trial on the pleadings, a final judgment is properly rendered; and upon a reversal thereof the appellate court will direct the proper judgment, not a new trial.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is a suit in equity to annul and enjoin enforcement of special assessment certificates issued under a reassessment for the same work involved in the certificates held invalid in *Saunderson v. Herman*, 95 Wis. 48, for the reason in that

case that no assessment of benefits and damages resulting from a change of established grade had been made. After the decision of that case and the enactment of ch. 262, Laws of 1897, to wit, July 6, 1897, the common council of Milwaukee passed a resolution directing the board of public works to make a reassessment under that chapter for benefits and damages resulting both from a change of grade and from the paving of Cape street, which was accordingly done. The board assessed benefits from the work done at the uniform rate of $240 per lot, except as to a certain triangular piece, to which was assessed $1,400 benefits. They then assessed as damages from the change of grade, including the improvements arising from such alteration, the cost of the work in front of each lot, and assessed as benefits conferred by said change of grade in common with other property on the street affected by such alteration of grade the uniform sum of $40 per lot, and upon the triangular piece $380. The net damages thus resulting from the change of grade, being deducted from the benefits assessed for the work done, still left an amount greater than the actual cost of the work abutting each lot, which accordingly was reassessed to its full amount against the several parcels of land, and special assessment certificates issued therefor, substantially corresponding in amount with those issued on the first assessment.

The answer set up the situation of the premises, the fact that the change of grade was nominal only, consisting merely in the increase of elevation resulting from putting stone pavement on top of the previous macadam, and that the declared elevation was almost entirely in the middle of the street, leaving the grade at the curb line practically unchanged; that no grading was done, save merely the smoothing of the surface, consisting in the removal of the pulverized macadam, and the leveling of depressions which existed therein, to make proper surface for laying stone blocks; that the ex-

pense of removing such pulverized macadam and filling up such depressions in the pre-existing pavement did not exceed two per cent. of the contract price of the total work done. It also appeared that the entire tracts of lands of the plaintiffs consisted on one side of the street in lumber-yard property, and on the other in coal-yard property. The answer further alleges that access to the premises was not disturbed by the work done in the street, and that neither the lots nor any improvements thereon were rendered less valuable.

The pleadings set forth the report of the board of public works certifying that in making the assessment October 14, 1897, the board of public works viewed the premises and considered the amounts to be made chargeable against the said several lots or pieces of land, and the benefits, in their opinion, actually accruing to, and the damages sustained by, such several pieces from such work done, and at the same time considered and determined the damages, costs, and charges, including the cost of such improvement, arising from the alteration of the grade, to the owners of each of the several lots or parcels of land belonging to plaintiffs, and also taking into consideration in each case any advantages and benefits which are or might be conferred thereby upon such lot or parcel of land in common with the other property on said street affected by said grade. The reassessment and certificates attacked were the result thereof.

The answer further alleges as a fact that by said change of grade, and by the paving and curbing done by the contractors, Donahue & Hoff, the premises of the plaintiffs "were severally benefited to an amount exceeding the damages, costs, and charges, including the cost of such improvement, arising from such alteration of grade, to the owners of said several lots, and exceeding the amount of the certificates severally assessed against said lots, which this action is brought to set aside."

The cause was submitted upon the pleadings, and the court held the answer not to constitute any defense, and rendered judgment in favor of plaintiffs in accordance with the prayer of the complaint, canceling said certificates, commanding the defendant *Herman* to deliver the same to the clerk for that purpose, and perpetually enjoining him from selling any of said certificates or from enforcing the same in any manner; from which judgment defendant *Herman* appeals.

For the appellant there were briefs by *Hoyt & Olwell*, and oral argument by *F. M. Hoyt.*

For the respondents there was a brief by *Miller, Noyes & Miller*, and oral argument by *Geo. H. Noyes.*

The following opinion was filed January 8, 1901:

DODGE, J. 1. In a case between these same parties relating to a former assessment upon the plaintiffs' property of the cost of the same work now involved, it was decided that such assessment was invalid because the board of public works did not, at the time of making their assessment of benefits to result from the work to be done in pursuance with sec. 7, ch. VII, Milwaukee Charter [ch. 184, Laws of 1874, as amended], also determine and assess against the same lots the damages, costs, and charges arising from the alteration of established grade previously enacted by resolution of the common council, as required by sec. 8, ch. VII. The first question now raised is whether a situation thus arose and existed, coming within the terms of the statutes for reassessment of special assessments (ch. 262, Laws of 1897, and secs. 1210*d*–1210*f*, Stats. 1898), the former of which enactments became law in April, 1897, and the latter in August, 1897. Those acts, identical as to the immediate subject, described the conditions under which reassessment should be made for work done where special assessments had been attempted as: "When such special assessment, or any special assessment certificate, tax sale, tax sale certifi-

cate or special improvement bond based thereon is or may be invalid by reason of failure to make a proper assessment of benefits and damages, or by reason of any failure to observe any provision of law, or by reason of any act or defect in the proceedings upon which such special assessment, special assessment certificate, tax sale, tax sale certificate or special improvement bond, is based." We can entertain no doubt that the ground of invalidity of the former certificates was entirely within these laws. That ground was obviously a "failure to observe a provision of law," namely, the provision of sec. 8, ch. VII, requiring that determination of damages resulting from change of grade should be made at the same time that the benefits to result from the work itself are assessed. Even if, however, a narrower construction were conceded to the statute, namely, that the failure to observe a provision of law must occur in the very act of apportioning the cost after the contract has been let and the work done, still the omission to determine damages from change of grade, which under the charter should precede making the contract, would fall within the third condition of sec. 1210*d*. It would be "an act or defect in the proceedings on which such special assessment, or certificate, is based." The situation presented came clearly within the calls of the statute in question. Work of the character there described had been done, and the special assessment therefor and the certificates issued were invalid for one or more of the reasons specified. Under such circumstances the statute made the cost of the work, not exceeding net benefits ascertained by a reassessment, a lien upon the property, commanded the issue of certificates therefor, and required the inclusion and collection of the amount of such certificate as a tax.

2. Respondents, by way of objection to the reassessment itself, invoke the rule recognized in several cases in this court, that a mere arbitrary imposition is void, and point to

the uniformity in assessments of benefits both from the work done and from the change of grade,—$240 to each lot from the former, and $40 to each from the latter,—as indicating that no discrimination or judgment was exercised. An examination of all the cases cited by respondent, from *Johnson v. Milwaukee*, 40 Wis. 315, to *Hayes v. Douglas Co.* 92 Wis. 429, discloses that the proposition therein decided is that the report of the assessing board must show affirmatively that they in fact considered and determined the benefits and damage to accrue to each lot, and that a merely arbitrary assessment, resulting from a rule of apportionment or of arithmetic independently of the exercise of judgment as to the actual benefit or damage, would not suffice. True, it was pointed out that uniformity of assessment was a significant circumstance, as there might be many others, to indicate an evasion of the duty of judgment as to each parcel, and to disprove such declaration in a report. See *Kersten v. Milwaukee*, 106 Wis. 200. Lack of such uniformity was, however, held suspicious in *Johnson v. Milwaukee, supra.* In no case, however, has it been held that such uniformity alone was sufficient to overcome the declarations of the officers, if any were contained in their report, though it might serve to further discredit a report and assessment which was barren of such declarations. In *Hayes v. Douglas Co., supra*, it was said: "When it is required that the assessment shall be according to benefits accruing to each parcel, an assessment by the frontage rule does not show affirmatively a compliance with the statute. While such assessment is not necessarily erroneous, it is presumed to be so, unless the return shows that the board has considered that matter and finds that the benefits are in the proportion of the frontage of each parcel." In the present case the return of the board of public works expressly certifies that they did view each lot and consider and determine, as to the same, both the benefits and damages, costs, etc., less

benefits resulting from change of grade. This official certificate is not overcome by the mere fact that each lot of the same size is determined to have received the same benefit, especially when, as here, it is made apparent that all the lots were used substantially alike, as a coal yard on one side of the street, and as a lumber yard on the other, and that the so-called change of grade was such as not to materially affect the accessibility, use, or value of any of them. Such extrinsic facts might not serve to supply the want of necessary averments in the report, but they are cogent to overcome other facts and circumstances by which such averments are sought to be denied. *Hennessy v. Douglas Co.* 99 Wis. 129.

3. Next it is contended that ch. 262, Laws of 1897, and its re-enactment in secs. 1210*d*–1210*f*, is unconstitutional. The authority in our own state is overwhelming in support of laws authorizing reassessment both of general taxes and of special assessments. There can be no doubt that the legislature has power to ratify imposition or direct reassessment of taxes which it might originally have authorized. *Cross v. Milwaukee*, 19 Wis. 509; *Dean v. Borchsenius*, 30 Wis. 236, 247; *Flanders v. Merrimack*, 48 Wis. 567. Whatever construction be given to it, sec. 1210*d* does not transcend the power of the legislature to prescribe conditions upon which the cost of an improvement may be imposed on the property benefited. If it be urged that conditions required by the charter originally cannot now be complied with,— such, for example, as that the ascertainment of benefits and damages cannot now precede the letting of the contracts, as was obviously the policy of the charter,— it is a complete answer that the legislature might originally have authorized a special assessment without making such ascertainment an essential preliminary to contracting. Indeed, had the legislature seen fit to authorize a reassessment

for the work in raising a street above its lawfully established grade in absence of any resolution lawfully changing the grade, how could we declare such act unconstitutional? The same imposition might have been authorized originally without requiring, as a condition, such preliminary action. No respect is suggested by counsel, and none occurs to us, wherein sec. 1210*d* omits any requirement or preliminary to imposition by reassessment of the expense of public improvements which the legislature might not, in its judgment, have dispensed with as prerequisite to original special assessments. That being so, we cannot hold that any constitutional limit to legislative power has been transgressed.

The suggestion that ch. 262, Laws of 1897, had, before the completion of the reassessment proceedings, been superseded by sec. 1210*d*, we deem of no importance. The latter is merely a substantial re-enactment of the former, and but perpetuates in existence the same legislation. The proceedings comply with both acts, and each (whichever was in force) authorized them. The fact that the report of the board declares their acts to have been done in compliance with the former act is wholly immaterial. Such declaration is not a denial that they also complied with the later one.

4. The most serious questions raised are whether, under the provisions of the Milwaukee charter, the attempted change of grade by resolution, without any petition therefor, is of any force at all, and, if not of force, whether the city government had any jurisdiction or power to improve the street to other than the old grade at expense of the lot-owners. These questions are, however, immaterial, and their decision is not essential, for the reason that it clearly appears from the answer, entitled as it is to liberal construction and to be taken as true, that, from a practical point of view, no

change has been made or attempted in the actual grade of the street. The increased elevation of the finished pavement was only about six inches above the old established grade, and that only in the center of the street. Such elevation, of course, did not involve expense in grading the street, but, on the contrary, avoided the expense of cutting down the old street to make room for the stones and the substratum necessary for permanently laying them,—expense which must have fallen on the lotowners had the city laid the new pavement at the exact level of the old grade. The result to the lots themselves is alleged to be without injury, cost, or inconvenience. The so-called change of grade was so slight and so without injurious effect that we must look upon it as *de minimis*, for which the law cares not, and for which the courts should not be troubled to seek remedy. Had the city undertaken to lay the pavement at the elevation in fact adopted, without any resolution purporting to change the established grade, no equity would have been presented in favor of the lotowners to prevent assessment of the cost upon them; and that consideration is not changed or affected by the fact that such a resolution was adopted, although the passage of the resolution might make necessary compliance with sec. 8, ch. VII, of the charter, requiring in such case an assessment of the damages, as decided in the former case.

None of the other suggestions of respondents' counsel seem to us to call for discussion. The defect found in the first proceedings, namely, the failure to include, at the same time with the assessment of benefits from the doing of the work, an assessment of the damages caused by the ostensible change of grade, does not exist in the present proceeding. It is now found that after ascertaining such damages and deducting them from the benefits caused by the improvement the net benefits still exceed the cost of the work, which, therefore, is now reassessed against the lots. The

reassessment proceedings are regular and comply with the directions of the charter. The facts as established by the admitted allegations of the complaint and by the answer present no equitable reason why the plaintiffs should not, in accordance with the policy of the charter and of sec. 1210*d*, Stats. 1898, pay the cost of the improvement of the street in front of their premises; it being less than the benefits conferred upon them. The conclusion is irresistible, under authority of *Wells v. Western P. & S. Co.* 96 Wis. 116, that a court of equity ought not to interpose in their behalf to prevent enforcement of such payment by the ordinary statutory machinery. The trial court should have refused to do so, and the judgment appealed from is erroneous.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment dismissing the complaint.

BARDEEN, J., took no part.

The following opinion was filed February 1, 1901:

DODGE, J. Respondents move to amend mandate so as to grant a new trial instead of ordering judgment for the defendant. This motion they predicate on the proposition that the judgment rendered by the circuit court in favor of the plaintiffs was founded upon a "motion for judgment on the answer," and contend that, had that motion been denied, they would then have been entitled to try the issue raised by the complaint and answer. Without considering whether that contention is correct, it suffices to point out that the situation upon which it is predicated is not shown by the record. We do not there find that there was a motion for judgment upon the answer. There is no bill of exceptions, and the judgment recites: "This cause having come on for trial before said court upon the answer of the defendant, . . .

the court finds that all the allegations of the complaint are admitted by the answer of the defendant *Henry Herman*, and exhibits thereto attached, except such allegations in said complaint as are denied by said answer, and that the answer of the said defendant *Henry Herman* does not constitute any defense herein, and that the plaintiffs are entitled to judgment in accordance with the prayer of the complaint." Upon this we must rely for information as to the proceedings. *Iron River v. Bayfield Co.* 106 Wis. 587. No other construction can be placed upon the recitation that the cause came to *trial* upon the answer, than that both parties consented to treat the answer as the basis upon which trial should be had. The record discloses no objection or exception to such trial. The consent to a trial upon that basis must be construed as a stipulation that the answer is true, not alone for the purposes of a motion or for the mere consideration of its sufficiency as a pleading, such as would be the admission in case of a demurrer, but true for the purposes of a trial from which is to result final adjudication of the rights of the parties. The trial of an action is a very different proceeding from the consideration of a demurrer or of a motion. It would be trifling with the court to invite it, by consent of counsel, to enter upon the trial of an action upon a given basis, and, when decision is reached as the result of such trial, to contend that the proceeding was tentative and experimental only. The view both of the court and of counsel for respondents is rendered apparent by the fact that, at the motion of counsel, final judgment was entered as the result of that trial. If the question submitted were, as counsel now contends, merely the sufficiency of the answer as a pleading, on resolution of which against the plaintiffs they should have a right to try the issues, the reciprocal right to the defendant of amendment in case of decision against him would seem clear, but nowhere in the

record is suggestion that any of the parties contemplated such a privilege. We think it plain, therefore, that the present motion of the respondents should be denied. The cause having been submitted to the circuit court for trial upon a given basis, it becomes the duty of this court, on reversing the action in fact taken by that court, to direct the action which would have been proper.

By the Court.—The motion is denied.

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1. The fact that, by force of sec. 4242, Stats. 1898, the presentation of a claim to a county board is to be considered the commencement of an action within the meaning of the statutes of limitations, does not render such an event generally the commencement of an action in a judicial sense. *Rice v. Ashland Co.* 189

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2. Sec. 2811*a*, Stats. 1898 (providing that circuit and superior courts may dismiss "any and all actions or proceedings pending therein in which issue shall have been joined and which shall not be brought to trial within five years from and after" their commencement) applies only to actions and proceedings pending for five years after jurisdiction thereof has been obtained by the courts

named. It has no application, therefore, to an appeal from the disallowance of a claim by a county board, which, through a mistake of the county clerk, did not reach the circuit court until more than five years thereafter and but a short time before the motion to dismiss was made. *Rice v. Ashland Co.* 189

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1. A petition for leave to adopt a child, under sec. 4021, Stats. 1898, may be sufficient to give the county court jurisdiction of the proceeding, although it fails to state all the facts essential to authorize such adoption and even fails to state the name or residence of either parent. *In re Estate of McCormick,* 234
2. Under sec. 4022, Stats. 1898, an order of adoption, made without the consent of the living parents or either of them, cannot be upheld on the ground that they had abandoned the child unless that fact was judicially determined and found by the county court. A subsequent finding of that fact by another court is of no avail; and there can be no presumption that the county court so found, where the record is silent as to the fact. *Ibid.*

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1. An order setting aside a foreclosure judgment because notice of *lis pendens* had not been duly filed, but not granting a new trial, is not appealable under subd. 2 or subd. 3, sec. 3069, Stats. 1898; and if the court had no power to make such order its action may be reviewed on *certiorari.* *State ex rel. Fuller v. Circuit Court,* 77
2. In an action to wind up a banking corporation and enforce the statutory liability of its stockholders, it was ordered that a defendant stockholder who had paid into court the par value of his stock be discharged from further liability and that the action be dismissed as to him without costs. *Held,* that such order was not in effect a final determination of the action as to said defendant, nor did it prevent a judgment from which an appeal might be taken, but on the contrary it contemplated such a judgment, and hence was not appealable under subd. 1, sec. 3069, Stats. 1898. *Allen v. Boberg,* 282

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3. Secs. 3069, 3042, Stats. 1898, give the right of appeal from an order granting, refusing, modifying, or dissolving an injunction, and limit

the time for taking the appeal to thirty days from the date of the service, by either party to the action upon the other, of a copy of the order with a written notice of the entry of the same. *Milwaukee E. R. & L. Co. v. Bradley,* 467

4. Sec. 3061, Stats. 1898, permits the trial court to stay the effect of an order of the kind above referred to on an appeal therefrom if, upon the making of the order, immediate notice of the appeal be given and within three days thereafter the appellant serves an undertaking upon the adverse party as therein provided. *Ibid.*

5. Sec. 3061, Stats. 1898, relates to the condition upon which an order appealed from may be continued pending the appeal, and does not affect the right of appeal or the time within which such right must be exercised. *Ibid.*

6. *Punch v. New Berlin,* 20 Wis. 189, was overruled by *Couldren v. Caughey,* 29 Wis. 317, which is in harmony herewith. *Ibid.*

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7. Where an order of the circuit court does not (as required by Circuit Court Rule XI, sec. 6) refer to the papers on which it was based, and the clerk's certificate to the return on an appeal therefrom does not show that he has sent to this court the papers used on the motion, the appeal must be dismissed. *Ryan v. Philippi,* 254

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8. Where a judgment recites that the cause came on for trial on defendant's answer, and the record discloses no objection to such trial, the appellate court will assume that the parties consented to treat the answer as the basis on which trial should be had, and stipulated that the answer was true, not only for the consideration of its sufficiency as a pleading, but also for the purposes of a trial. *Sanderson v. Herman,* 662

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9. An order refusing to dismiss an action for want of prosecution under sec. 2811*a*, Stats. 1898, is an intermediate order and will not be reviewed on appeal from a judgment subsequently rendered unless it was excepted to and the order and exception incorporated into the bill of exceptions. *Midlothian I. M. Co. v. Dahlby,* 195

10. The question whether a complaint states a cause of action will not be considered on appeal unless it was raised in the trial court by demurrer or objection to the admission of any evidence thereunder. *Ibid.*

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11. The findings of a referee on controverted questions of fact, confirmed by the court having original jurisdiction over the matter, cannot be disturbed on appeal unless they are against the clear preponderance of the evidence, indicating that it was not properly considered through mistake in overlooking material parts thereof or from prejudice or some other cause. *Wyss v. Grunert,* 38

12. Because of his superior advantages for accurately weighing evidence and discovering the truth, the conclusions of the trial judge on questions of fact should not be disturbed on appeal unless manifestly wrong. *Davies v. Jeffris,* 244

13. The conclusions of a trial court on questions of fact cannot be disturbed on appeal unless they are against the clear preponderance of the evidence. *Seeman v. Biemann,* 365

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14. The admission of evidence of immaterial facts was not prejudicial where they had previously appeared in the case by evidence which was properly received. *Scott v. Hobe,* 239

15. Where a cause is tried by the court, the admission of improper evidence will not work a reversal if there is sufficient competent evidence to support the findings. *Wussow v. Hase,* 382

16. Errors in the instructions to the jury and in the form of the questions submitted for an advisory verdict are immaterial, where the finding of the court is sustained by the evidence, regardless of the verdict. *In re Guardianship of Welch,* 387

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17. Where no motion was made in the trial court to strike out findings in the special verdict which were contrary to the undisputed evidence, and for judgment on the verdict, this court will not direct judgment but will order a new trial. *Dummer v. Milwaukee E. R. & L. Co.* 589

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18. Error of the county court in admitting in evidence, in support of a claim against a decedent, notes purporting to have been signed by him, without proof of his signature, does not necessarily establish "that justice requires a revision of the case" and that an appeal from the allowance of the claim should be granted, under sec. 4035, Stats. 1898, after the time for appeal has expired. *Deering Harvester Co. v. Johnson,* 275

19. In such a case the petition for leave to appeal was supported only by an affidavit of the *executor's attorney,* showing that the failure to perfect an appeal in due time was due to an excusable mistake, and stating that *the executor* "believes that justice requires a revision of the case for the reason that there never was any consideration for said notes, and the estate" does not owe the debt, "as *said executor* is informed and believes," but not stating what information the executor had or any facts justifying his belief. It was not asserted that the notes were not duly executed by the deceased; and affidavits on behalf of the claimant were to the effect that they had been so executed. *Held,* that the denial of the petition was not an abuse of discretion. *Ibid.*

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ATTACHMENT.

1. The rule that the provisional remedy by attachment of real estate when exercised to the extent of filing a copy of the writ of attachment, with the proper official certificate of the levy indorsed thereon, in the office of the register of deeds of the proper county, will be deemed waived in case of neglect to seasonably obtain full jurisdiction of the subject of the levy by service of the summons upon the defendant in the action, is limited to the circumstances named. *Barth v. Loeffelholtz,* 562

2. An attachment lien may be lost by laches like any other valuable right. An issue in that regard is one of fact, and the finding in regard to it cannot be disturbed unless against the clear preponderance of the evidence. *Ibid.*

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1. In proceedings to disbar an attorney at law, there is *held* to have been a clear preponderance of satisfactory evidence in support of findings of the trial court, to the effect that the defendant attempted to deceive the court in which a judgment had been rendered against him by making and presenting, upon a motion to set aside an execution issued on such judgment, affidavits known by him to be false, stating that he had, at a certain date prior to the issuance of such execution, served a notice of appeal from such judgment upon the attorney of the opposite party and upon the clerk of the court, and by falsely pretending and claiming that a certain paper, found some months later in the clerk's office among the papers in the case, was the notice he had served on the clerk, when in fact such paper had been secretly placed among the files by defendant himself at some time after the issuance of the execution. *Flanders v. Keefe,* 441

2. For such misconduct the defendant was properly disbarred. *Ibid.*

BANKS AND BANKING.

See APPEAL, 2.

In an action by a creditor of a bank against its officers to recover property alleged to have been lost by their negligent and fraudulent mismanagement of its business, the complaint must allege as to each defendant that he was an officer of the bank when the acts complained of took place. *Gores v. Elliott,* 465

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BILLS AND NOTES.

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1. For breach of a contract to return a promissory note to the maker upon demand there may be a recovery of actual damages, although the maker has not paid the note. *Lyle v. McCormick H. M. Co.* 81

2. If, in such a case, the note has been transferred to a *bona fide* holder, the damage to the maker is the continued existence of his liability

thereon, and the measure of his recovery would be the value of the note, where no special damage is shown. *Ibid.*

3. The fact that the maker of the note, in such a case, is insolvent or "execution proof" does not necessarily render the note valueless or preclude damage to him from the existence of the liability. At most, his financial condition is a circumstance to be considered in assessing the damages. *Ibid.*

4. The jury having been instructed, in such a case, that the measure of damages was the actual value of the note, and that plaintiff's solvency was an element to be considered in ascertaining the amount, it was not error to refuse to submit in the special verdict a question as to whether judgment against plaintiff on the note could be collected on execution. *Ibid.*

5. An express contract that a note given for a debt of the maker should operate as a payment may be established in whole or in part by circumstantial evidence, but mere circumstances that point one way as reasonably and significantly as the other are insufficient for that purpose, and in the absence of other evidence the question should not be submitted to the jury but should be determined by the court, as matter of law, against the party asserting such contract, upon whom was the burden of proof. *McDonald v. Provident S. L. A. Society,* 213

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Defendant, wishing to sell a farm, agreed to pay a commission to a broker if the latter would bring him a man with whom he could deal. The broker brought a man who wished to trade, but he and defendant disagreed as to values and separated, without further communication until about six months later. The broker testified that in the meantime he had several conversations with defendant, urging the latter to make the trade, the last being about two weeks before the trade was consummated. Defendant claimed that the trade was an independent transaction, brought about by another real-estate agent. The latter testified that he acted as the agent of the other party to the trade. *Held,* upon the evidence, that it was a question for the jury whether the original negotiation was completely closed and ended, so that the trade finally made was an independent one with which the broker had nothing to do. *Willey v. Rutherford,* 35

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1. A building contract provided that alterations might be made in the plans and specifications, either by way of addition or deduction, without vacating the contract, and that the value thereof should be estimated and added to or deducted from the contract price. *Held,* that guarantors of faithful performance by the contractor were not released by reason of alterations which did not change the character of the building or unreasonably increase the expense. *Kretschmar v. Bruss,* 396

2. Where a building contract prohibited the making of any changes or of any allowance therefor unless ordered in writing, and the trial court has found that certain changes were made by direction of the owner and his architect and an allowance made therefor by the architect, it will be presumed, in the absence of a finding to the contrary, that the direction for the changes was in writing. *Ibid.*

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Where a writ of *certiorari* discloses the absence of any facts which could have justified other action than that taken by the board whose proceedings are being reviewed, the writ is properly quashed on motion. *State ex rel. Giroux v. Lien,* 316

CHAMPERTY.

1. The purchase by an attorney of the claim of his client, pending an action for its enforcement, with the intent to carry on the litigation at his own expense and for his own benefit, is champertous and void. *Miles v. Mut. R. F. L. Asso.* 421

2. Champerty need not be pleaded or an issue formed in regard thereto in order that it may be established and a dismissal of the action obtained because thereof. *Ibid.*

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CHATTEL MORTGAGES.

1. A mortgage of a stock of merchandise permitted the mortgagor to sell and to make additions to the stock, but was silent as to the disposition to be made of the proceeds of sales over and above the additions. In a foreclosure action it appeared that sales were largely in excess of the additions; that only a small part of such excess was applied on the mortgage debt; and that the mortgagee knew the fact and made no objection. *Held,* that in the absence of any explanation the court might properly assume that the remainder of said excess was used by the mortgagor pursuant to some understanding, express or implied, with the mortgagee; and that by reason thereof the mortgage, even if valid on its face, was void as to creditors. *Durr v. Wildish,* 401

2. Where such an understanding between mortgagor and mortgagee exists, the fact that the mortgagee afterwards takes possession of the property does not validate the mortgage as against creditors. *Ibid.*

3. Where the facts invalidating a chattel mortgage appear from the complaint in a foreclosure action and from evidence admitted without objection, they sustain a finding of such invalidity, even though no such issue was tendered by the answer. *Ibid.*

4. In an action to foreclose a chattel mortgage the fact that the mortgagor had other creditors is properly shown by the record of a voluntary assignment by the mortgagor, showing the filing of claims against him which were not objected to,—the plaintiff having become a party to the assignment proceedings by filing his claim secured by the mortgage, and having contested the right of the assignee to possession of the mortgaged property. *Ibid.*

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In an action upon an account which extended over a considerable number of years, the evidence is *held* to show — contrary to a referee's finding, confirmed by the trial court — that during that period there had been at least one complete settlement of the accounts between the parties. *Weille v. Reinhard,* 73

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See BILLS AND NOTES. BROKERS. BUILDING CONTRACTS. CHATTEL MORTGAGES. CORPORATIONS, 1–6, 8. COUNTIES. DAMAGES. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES. GARNISHMENT. GUARDIAN AND WARD. INSURANCE. LANDLORD AND TENANT. LIENS. LOGS AND LUMBER, 2. MASTER AND SERVANT, 1–4. MORTGAGES, 2. MUNICIPAL CORPORATIONS, 1. PAYMENT, 2, 3. SALES. TRUSTS. VENDOR AND PURCHASER. VERDICT, 3.

Signature induced by fraud: Negligence.

1. A German of considerable experience in the business of selling farm machinery signed a written contract to purchase two grain drills. He could read business papers in English, and his adult son, who had a good education and acted as his bookkeeper, was present, but neither of them read or tried to read the contract, though there was nothing to prevent it. *Held,* that he was guilty of negligence which prevents his defending against an action on the contract on the ground that he was induced to sign it by fraudulent representations as to its contents. *Dowagiac Mfg. Co. v. Schroeder,* 109

Construction: Parol evidence.

2. One S. agreed to run a saloon and restaurant for plaintiff on premises leased by the latter, to purchase all goods thereafter needed in plaintiff's name, to pay all expenses and accounts of the business excepting the rent, which was to be paid by plaintiff, and to pay to plaintiff $75 monthly. By a bond reciting such agreement and given to secure its performance by S., the defendant H. undertook to save plaintiff harmless from "all bills, accounts, or obligations herein mentioned, *except rent.*" *Held:*

(1) H. was not liable to plaintiff on the bond for the stock on the

premises, purchased from him by S. at the time the latter went into possession.

(2) The words "except rent," in the bond, construed in the light of the situation of the parties at the time it was executed, and of their acts under it, refer to the stipulated monthly payment of $75. *Wussow v. Hase,* 382

3. Parol evidence is inadmissible to show what the understanding of the parties was prior to the execution of a written contract, but where any of its provisions are ambiguous — as where the subject matter of an exception therein is not fully identified — extrinsic evidence is admissible to place the court in the position of the parties at the time the contract was executed, and also to show their acts under it, in order that the true meaning of the language used may be ascertained. *Ibid.*

Reformation. See REFORMATION OF INSTRUMENTS.

4. To warrant a court in changing the language of a written contract so as to conform to the preceding verbal agreement between the parties, there must be clear and satisfactory evidence that an error in reducing such verbal agreement to writing occurred through a mutual mistake or a mistake on one side and fraud upon the other. *Seeman v. Biemann,* 365

Rescission for fraud.

5. The doctrine that before a person can rescind a contract for fraud he must restore the wrongdoer to his previous position, does not require the restoration to such wrongdoer of things which are of no value whatever, or the restoration to a third person of things received from him. It does not extend to *res inter alios acta. Wyss v. Grunert,* 38

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 8–9. RAILROADS, 1–3. STREET RAILWAYS, 4, 6, 11–17, 19–22.

CONVEYANCES. See EJECTMENT. FRAUDULENT CONVEYANCES. LANDLORD AND TENANT, 3, 7. REFORMATION OF INSTRUMENTS. TRUSTS. VENDOR AND PURCHASER, 2, 3.

CORPORATIONS.

Subscription to stock: Action: Pleading: Fraud.

1. In an action by a corporation to recover a balance due upon a subscription to its capital stock, the complaint alleged and the answer admitted, in effect, that at the time of such subscription plaintiff was a duly organized corporation, authorized to issue shares of its capital stock and to receive subscriptions therefor. *Held,* that this authorized the court to assume that at least one half of the capital stock had been duly subscribed and at least twenty per cent. thereof actually paid in, as required by sec. 1773, Stats. 1898; and that an action on the subscription agreement could be maintained. *Anvil M. Co. v. Sherman,* 74 Wis. 226, distinguished. *Milwaukee B. & C. Co. v. Schoknecht,* 457

2. No statement as to what a corporation will do or intends to do in the future, made to induce a subscription to its capital stock, constitutes a fraud which will be a defense to an action on the subscription contract. *Ibid.*

Enforcement of stockholders' rights: Pledge of stock: Parties: Laches.

3. A complaint showing that a contract by which a corporation was to sell shares of its stock to plaintiff had been so far performed as to place the title to the shares in plaintiff, though they were left

in the hands of a pledgee to secure payment of plaintiff's note for the purchase price, and that the action was brought to compel recognition of his rights as a stockholder, which had been fraudulently or wrongfully denied him, and for incidental relief by way of an accounting to ascertain the profits accruing upon his stock which should have been declared as dividends and applied upon his said note, is *held* on demurrer to state an equitable cause of action against the corporation, although the heirs of the pledgee, who are alleged to hold all the stock of the corporation, but do not appear to have any title to plaintiff's shares, are not made parties to the action. *Morey v. Fish Bros. Wagon Co.* 520

4. Although the action was not commenced until more than nine years after the making of the contract and the pledging of plaintiff's shares, yet, plaintiff's right to the shares not having been denied until a short time before the commencement of the action, and his note for the payment of which they were pledged not having been paid by the application of declared dividends as provided in the contract, the action was not barred either by the six-year statute of limitations (subd. 3, sec. 4222, Stats. 1898) or by laches. *Ibid.*

Officers: Powers, duties, and liabilities. See BANKS AND BANKING. INSURANCE, 4. LIBEL AND SLANDER, 2, 3.

5. A director has no power, unless specially authorized, to bind the corporation by false and fraudulent representations, or even by an express promise. *Milwaukee B. & C. Co. v. Schoknecht,* 457

Same: Execution of contracts.

6. The fact that a contract in the name of a corporation was not executed by the proper officers does not render it void, if the corporation had clothed the agent who executed it with apparent authority so to act. Thus, a guaranty of performance of a building contract, executed in the name of a corporation by an employee whose business was to figure estimates and make sales to contractors, and delivered to an architect to whom the same employee had at other times delivered similar guaranties so executed, of which the corporation had received the benefits and one of which had been witnessed by the vice-president and manager of the corporation, is *held* binding on the corporation. *Interior Woodwork Co. v. Prasser,* 557

Same: Declaration of dividends: Equity.

7. Although courts will not, as a general rule, interfere with the discretion of the directors of a corporation as to the declaration of dividends, yet when it appears that they are guilty of fraud or bad faith or a wilful abuse of their discretionary powers either in declaring or in refusing to declare a dividend, a court of equity will interfere and compel the proper action. [Whether the directors must be joined as parties to the action, in order to obtain such relief, not determined.] *Morey v. Fish Bros. Wagon Co.* 520

Same: Competency as witnesses. See WITNESSES, 1.

Corporate powers: Ultra vires: Guaranty.

8. A corporation organized to carry on "a wholesale lumber business and all business incidental thereto" may guaranty the performance of a building contract by a contractor to whom it is furnishing materials for the building, and may agree to save the owners harmless from mechanics' liens, etc. *Interior Woodwork Co. v. Prasser,* 557

Suspending "ordinary business" by injunction. See INJUNCTIONS, 2.

Insolvency: Winding up: Discharge of stockholder. See APPEAL, 2.

COSTS.

1. Sec. 2789, Stats. 1898 (providing that where the plaintiff has not accepted defendant's offer of judgment, if he "fail to obtain a more favorable judgment he cannot recover costs, but must pay defendant's costs from the time of the offer"), applies only to costs accruing after the time of the offer and does not preclude the plaintiff in such a case from recovering his costs up to that time, if he would otherwise be entitled thereto. *Montgomery v. Am. Cent. Ins. Co.* 146

2. A proceeding for the appointment of a guardian being a "special proceeding," costs may be awarded against the petitioners under subd. 7, sec. 2918, Stats. 1898 (providing that in "special proceedings costs may be allowed or not to any party, in whole or in part, in the discretion of the court." Sec. 2932 (providing for the payment of the costs out of the estate "in any *action* prosecuted or defended by an executor," etc.) applies to "actions" only. *In re Guardianship of Welch.* 387

3. In a will contest, if the contestant has acted in good faith and the questions of law or fact are worthy of consideration, costs taxed against him in the supreme court should be paid out of the estate. *In re Will of Healy: O'Shea v. O'Shea,* 632

COUNTERCLAIM. See LANDLORD AND TENANT, 4-7.

COUNTIES.

Powers of county board, etc.: Paupers: Inebriety: Ratification.

1. Neither the county board nor any county officer has any authority, under our statutes, to incur any liability for medical treatment of a pauper to cure him of inebriety as a disease. *Putney Brothers Co. v. Milwaukee Co.* 554

2. A county cannot ratify the unauthorized acts of its agents which are beyond the scope of its corporate powers. *Ibid.*

County clerk and treasurer: Custody of redemption moneys. See TAXATION, 2.

County insane asylums: Contracts: Lowest bidder: Alterations.

3. Under secs. 603, 604, Stats. 1898 (providing that upon the adoption of plans for buildings for a county insane asylum by the county board, that body may "proceed to contract for the construction of said buildings, with the lowest bidder or bidders, for all the work and material required therefor"), no discretion is vested in the county board to award the contract to the person whose bid, in their judgment, is the most advantageous to the county, but they must let the contract to the person who has offered to do the work for the least money. *Mueller v. Eau Claire Co.* 304

4. The insertion, in a contract for the construction of a county insane asylum, of a clause (usually put in building contracts) permitting the building committee to require alterations, additions, or omissions from the work specified without avoiding the contract, is not an evasion of the statute (sec. 604, Stats. 1898) declaring that the county board shall prepare "complete" plans and specifications for the work. Such a clause permits only the making of such changes as will not substantially alter the character of the building or increase its cost to an unreasonable amount. *Ibid.*

County buildings: Issue of bonds: Validity.

5. Bonds issued for the construction of a county insane asylum, under sec. 603, Stats. 1898, are not issued "to provide county buildings," within the meaning of sec. 658, Stats. 1898, limiting the amount to which bonds for the latter purpose may be issued. *Kyes v. St. Croix Co.* 136

6. Sec. 658, Stats. 1898, provides that no bonds shall be issued thereunder unless the resolution or ordinance of the county board, authorizing the same, "shall also provide for the collection of a direct annual tax sufficient to pay the interest as it falls due and to pay the principal within the time fixed therefor." Sec. 659 provides that "the tax provided therefor shall be incapable of repeal, but shall be annually collected," etc. *Held*, that a resolution declaring that "there shall be annually levied by the county board . . . at the annual sessions thereof . . . a direct annual tax sufficient to pay," etc., does not provide for the *collection* of such tax, as intended and required by sec. 658, but is only a promise or a command, not binding upon future county boards. *Ibid.*

7. Compliance with such requirement of sec. 658, Stats. 1898, cannot be held unnecessary, nor can the bonds be held valid in spite of noncompliance, even if a clear and imperative duty to raise an annual tax to meet the bonds is imposed by law or by the constitution upon the county. *Ibid.*

Restraining illegal action: Bonds: Contracts:

8. A taxpayer may maintain an action to restrain the illegal issuance of county or municipal bonds or the unlawful incurring of municipal debt, because of his liability to taxation to meet the proposed bonds or debt, without showing himself to be directly interested in the performance of the act, omission of which causes the illegality. *Kyes v. St. Croix Co.* 136

9. Where the issuance of county bonds would be illegal because of the failure to make an irrepealable provision for the collection of a direct annual tax sufficient to pay them, as required by sec. 658, Stats. 1898, a taxpayer of the county has a direct pecuniary interest to be affected by such failure; for such a provision would tend to enhance the price of the bonds, to the benefit of the county and the relief of the taxpayer. *Ibid.*

10. A taxpayer may maintain an action to restrain a county from carrying out an illegal contract which will cast a burden of debt on the county, whether his individual loss will be great or small. *Mueller v. Eau Claire Co.* 304

Claims against counties. See ACTION.

COUNTY CLERK. See TAXATION, 2.

COUNTY COURTS. See APPEAL, 18, 19. COURTS, 2.

COURT AND JURY. See BILLS AND NOTES, 5. BROKERS. DURESS. INSURANCE, 8. JUDGMENT, 2. MASTER AND SERVANT, 6. STREET RAILWAYS, 6, 8–11, 14, 15, 21. TRIAL, 1.

COURTS.

See GARNISHMENT, 2.

1. The state courts have jurisdiction of actions against trading consuls or vice consuls of foreign nations concerning matters arising out of their business, there being no constitutional, statutory, or treaty

provision vesting exclusive jurisdiction of such cases in the United States courts. *Scott v. Hobe,* 239

2. The circuit court has jurisdiction of an action for equitable relief which is obtainable only in a court of general jurisdiction, even though the interest or right in question is connected with the estate of a deceased person, which is in course of administration in the county court. *Morey v. Fish Bros. Wagon Co.* 520

COVENANTS. See LANDLORD AND TENANT, 3, 7.

CREDITORS' REMEDIES. See ATTACHMENT. BANKS AND BANKING. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES. GARNISHMENT. JUDGMENT, 3, 4. LIENS. SALES, 4–6.

CRIMINAL LAW AND PRACTICE.

1. Where the other essentials of the crime are present, any actual penetration is sufficient to constitute rape, and the degree to which the person of the female was entered is not material. *Murphy v. State,* 111

2. Statements of the prosecuting attorney in opening the case, and questions on cross-examination of the accused, which merely tend to prejudice the jury and to induce them to believe the accused guilty because of past transactions in his life in no way connected with the offense charged, are improper, and will work a reversal if it clearly appear that the accused may probably have been prejudiced thereby. In this case, however, references to the accused as a tramp, and questions as to his past life not bearing on his credibility, are *held* not to have constituted a material error, because the evidence properly introduced in proving the offense pretty clearly indicated that he was a tramp, and the improper questions elicited nothing prejudicial. *Ibid.*

3. An information is not insufficient because the charging clause does not conclude with the words "against the peace and dignity of the state of Wisconsin." *Ibid.*

4. The court should fully instruct the jury as to every offense included in the information of which the accused might reasonably, upon the evidence, be convicted. But on a prosecution for rape, failure to instruct as to the lesser offenses included therein was not an error prejudicial to the accused, where the jury understood that, unless they found from the evidence beyond a reasonable doubt all the facts requisite to a conviction of the full charge, they must render a verdict of acquittal. *Ibid.*

5. Where the jury were charged that there was a legal presumption of innocence which entitled the accused to an acquittal unless overcome by the evidence, a refusal to give an instruction repeating the idea in different language, which might have impressed such idea more definitely upon the minds of the jury, was not a material error, though it would have been better to give it. *Ibid.*

6. A charge that the presumption of defendant's innocence "continues till the state shall satisfy you beyond any reasonable doubt of his guilt," is *held* not to have been misleading, where what followed clearly indicated that the jury were to consider all the evidence, not merely that on the part of the state, in determining whether the presumption had been overcome. *Ibid.*

7. Omission to explain to the jury the meaning of the term "reasonable doubt" is not error where no instruction on that point is re-

quested. The giving or omission of such explanation is a matter in the discretion of the trial court. *Ibid.*

8. For rape upon a girl ten years old, a sentence of imprisonment for twenty-five years, which by good conduct can be reduced to less than fourteen years, is not excessive, and cannot be said to violate the constitutional provision against cruel and unusual punishments. *Ibid.*

CROSS-EXAMINATION. See CRIMINAL LAW, 2.

CUSTOMS AND USAGES.

A custom in logging sections for loggers to use old roads over private lands, and to make repairs necessary to such use, does not give the right to use such a road against the consent of the owner. Any implied license of use would be revocable at any time, even if the revocation were prompted by malice or ill will. *Marshfield L. & L. Co. v. John Week L. Co.* 268

DAMAGES.

See BILLS AND NOTES. LANDLORD AND TENANT, 6. MUNICIPAL CORPORATIONS, 2–5. PARENT AND CHILD. SALES, 3.

1. If it be stipulated in a contract that recoverable damages for a breach thereof shall be contingent upon a claim being made therefor within a specified time and in a particular way, such condition is controlling. *Seeman v. Biemann,* 365

2. If by the literal sense of a contract, expressed in general language, recoverable damages for a particular breach thereof be stipulated and be greatly in excess of actual damages, and the latter be readily ascertainable by computation, by a well settled but arbitrary rule of judicial construction, so called, the court will say the parties intended what was reasonable, treat the stipulated amount as a penalty, and confine the recovery of the party damnified to such sum as will measure his actual loss according to the ordinary rules for assessing damages for breach of contract. *Ibid.*

DEBTOR AND CREDITOR. See ATTACHMENT. BANKS AND BANKING. CHATTEL MORTGAGES. COMPROMISE AND SETTLEMENT. FRAUDULENT CONVEYANCES. GARNISHMENT. JUDGMENT, 3, 4. LIENS. PAYMENT. PLEADING, 2. PRINCIPAL AND SURETY. SALES, 4–6.

DECEIT. See CORPORATIONS, 2, 5.

DEEDS. See EJECTMENT. FRAUDULENT CONVEYANCES. GUARDIAN AND WARD. REFORMATION OF INSTRUMENTS. TAXATION, 3, 4. TRUSTS. VENDOR AND PURCHASER, 2, 3.

DEFICIENCY, Judgment for. See MORTGAGES, 2.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See ATTACHMENT. CORPORATIONS, 4. EXECUTORS, 3. FRAUDULENT CONVEYANCES, 6. MUNICIPAL CORPORATIONS, 2. SALES, 2.

DEMURRER. See APPEAL, 10. PLEADING.

DESCENT AND DISTRIBUTION. See EXECUTORS, 2, 3. WILLS.

DISBARMENT. See ATTORNEYS AT LAW.

DISCLAIMER OF TITLE. See EJECTMENT, 1.

DISCRETION. See APPEAL, 19. CORPORATIONS, 7. CRIMINAL LAW, 7. INJUNCTIONS, 5, 6. INSANE PERSONS, 1, 3. INSURANCE, 4 (2). LIMITATION OF ACTIONS, 5–9. NEW TRIAL. VERDICT, 2.

DISMISSAL.
Of action. See ACTION, 2. APPEAL, 2. CHAMPERTY, 2.
Of appeal. See APPEAL, 7.

DISTRICT ATTORNEY. See CRIMINAL LAW, 2.

DIVIDENDS. See CORPORATIONS, 7.

DURESS.

What constitutes duress is a matter of law, and whether duress existed in a particular transaction is a question of fact for the jury; but where (as in this case) the evidence shows that there is no foundation for the claim of duress the court may so decide and take the case from the jury. *Rochester M. T. Works v. Weiss,* 545

EJECTMENT.

1. If a defendant in ejectment answer by a full disclaimer and the answer be not falsified, he is entitled to a judgment dismissing the action with costs; though the judgment is nevertheless conclusive of plaintiff's title against the defendant and all persons claiming under him by title acquired subsequent to the filing of the notice of the pendency of the action in the office of the register of deeds of the proper county. *Webster v. Pierce,* 407
2. The status of the owner of a tax title to unoccupied land, created by the tax deed and record thereof, as regards being liable to an action of ejectment by the former owner if the tax deed be void, is destroyed as to him by the conveyance of the tax title to another, though such other do not place his deed upon record. *Ibid.*
3. The general statute, sec. 3187, Stats. 1898, regarding the filing of notices of *lis pendens* in actions affecting title to real property, does not apply to actions of ejectment, such actions being governed by sec. 3088. *Ibid.*
4. The owner of land by title acquired of the defendant in an action of ejectment prior to the commencement of such action and held under an unrecorded deed is not bound by the judgment therein against such defendant, though a notice of the pendency of the ejectment action be filed under sec. 3187, Stats. 1898. Such judgment only binds the defendant and all interested in the subject of the action by title acquired from the defendant subsequent to the filing of the notice of the pendency thereof, as provided in sec. 3088. *Ibid.*

ELECTION of remedies. See JUDGMENT, 3, 4.

ENTIRE CONTRACT. See MASTER AND SERVANT, 3.

EQUITY. See ACCOUNT STATED. APPEAL, 3–6. CONTRACTS, 4, 5. CORPORATIONS, 3, 4, 7. COUNTIES, 8–10. COURTS, 2. EXECUTORS, 2, 3. FRAUDULENT CONVEYANCES. INJUNCTIONS. LIMITATION OF ACTIONS, 1, 2. MORTGAGES. PRINCIPAL AND SURETY. REFORMATION OF INSTRUMENTS. TRUSTS. VENDOR AND PURCHASER, 2, 3.

ESTATES OF DECEDENTS. See COSTS, 2, 3. COURTS, 2. EXECUTORS. LIMITATION OF ACTIONS, 1–3. MASTER AND SERVANT, 1–4. WILLS.

ESTATES TAIL. See WILLS, 3.

EVIDENCE. See ACCOUNT STATED. APPEAL, 18. BILLS AND NOTES, 5. CHATTEL MORTGAGES, 4. CONTRACTS, 8. CRIMINAL LAW, 2. INSANE PERSONS, 3. INSURANCE, 7, 8. LOGS AND LUMBER, 3–6. MASTER AND SERVANT, 1, 2. OFFICERS, 2. PARENT AND CHILD. PAYMENT, 1, 2. SALES, 6. TAXATION, 1. WITNESSES.

EXCEPTIONS. See APPEAL, 9.

EXCESSIVE DAMAGES. See NEW TRIAL, 3.

EXECUTORS AND ADMINISTRATORS.

See APPEAL, 18, 19. COSTS, 2, 3. COURTS, 2. LIMITATION OF ACTIONS, 1–3. MASTER AND SERVANT, 1–4. WILLS.

1. The person named as executor in a will is not an executor until he has qualified as such and been confirmed in his office. *Fox v. Martin*, 99

2. Sec. 3940, Stats. 1898, provides that in the judgment assigning the residue of an estate the county court shall name the persons entitled thereto and the part to which each is entitled, and that "such persons shall have the right to recover their respective shares . . . from any person having the same." Such a judgment recited that the residue consisted of "notes and mortgages and money on hand, amounting in all to the sum of $43,547.15," and assigned to each of the residuary legatees one fifth thereof, "being the sum of $8,709.43." The executors divided said notes, mortgages, and money among the residuary legatees, with their consent and co-operation, upon the assumption that all the securities were valid, and took from each a receipt for the amount. Some years afterward it was discovered that certain of the securities were forgeries or otherwise invalid; and the several persons who had received them brought suit against all the other residuary legatees to set aside the judgment and to have the true amount of the residue of the estate ascertained and to compel the defendants to pay a sufficient amount to equalize the distribution. *Held:*
   (1) The recital of amounts in the judgment was not an essential part thereof and is not conclusive upon the parties.
   (2) The division of the securities was not made by the judgment, but in effect by the parties themselves as a settlement of the estate, and having been made under a mutual mistake of fact it may be set aside on that ground.
   (3) Such division and settlement was a single transaction affecting all the parties, and there was no misjoinder of causes of action. *Maldaner v. Beurhaus*, 25

3. The judgment assigning the residue was entered in February, 1893. After the death, in October, 1896, of a banker through whom the decedent had obtained the securities, it was discovered that some of them were invalid through forgery or fraud of said banker, but the question as to the validity of one note and mortgage was not decided until the termination of litigation with the makers in April, 1899. The present action was commenced in August, 1899. *Held*, that it was not barred either by subd. 3, sec. 4222, Stats. 1898, or by laches. *Ibid.*

FALSE REPRESENTATIONS. See CORPORATIONS, 2, 5.

FEES of counsel: Allowance. See WILLS, 1, 2.

FELLOW-SERVANTS. See MASTER AND SERVANT, 6.

FIRE INSURANCE. See INSURANCE, 11–18.

FOREC OSURE. See LIENS. MORTGAGES.

FORFEITURE. See INSURANCE, 2–6.

FRAUD. See BANKS AND BANKING. CONTRACTS, 1, 4, 5. CORPORATIONS, 2, 5, 7. FRAUDULENT CONVEYANCES. TRUSTS.

FRAUDS, STATUTE OF.

See MASTER AND SERVANT, 8. VERDICT, 8.

A covenant under seal is not within the statute of frauds (sec. 2307, Stats. 1898), providing that every special promise to answer for the debt of another person shall be void unless the agreement, or some note or memorandum thereof, expressing the consideration, be in writing, etc. The seal itself imports a consideration. Sec. 4195. *Kuener v. Smith*, 549

FRAUDULENT CONVEYANCES.

See CHATTEL MORTGAGES. PRINCIPAL AND SURETY.

1. Nine years after giving to his wife, for money borrowed from her, a note for $2,300, bearing ten per cent. interest, a husband purchased land for $6,000 and applied the amount due on the note in part payment therefor, furnishing the rest of the purchase price himself. He took the title in his own name, treated the property as his own for seven years, and then, being insolvent, conveyed it to his wife without consideration. He had previously transferred to her other property and money to a considerable amount, and she was assisting him in the effort to keep his property out of the reach of his creditors. On the strength of his ownership of the land he had obtained credit from plaintiff, and the conveyance to the wife was made while plaintiff's action against him on the debt was pending, and was not recorded until the day before the entry of plaintiff's judgment. It was claimed that the land was originally purchased with the understanding that the husband should take the title and convey to the wife at any time she desired it. *Held*, that the conveyance to the wife was properly adjudged void as to creditors. *Martin v. Remington*, 100 Wis. 540, distinguished. *Van Dusen v. Hinz*, 178
2. The parties to a mortgage of real estate agreed in writing that it should not be recorded except in case of default in the payments or the death of either party, the reason being that if recorded it would injure the credit of the mortgagor in his business. The agreement was observed for more than four years, during which time various persons gave the mortgagor credit on the faith of his apparent ownership of the property, with no knowledge of the mortgage. *Held*, that the mortgage was fraudulent and void as to the creditors so deceived. *Kickbusch v. Corwith*, 634
3. A finding of the trial court to the effect that certain mortgages of real estate and of chattels and a transfer of corporate stock, by an insolvent debtor, were all made in good faith, to secure a *bona fide* indebtedness, and with no intent to defraud or delay creditors, is *held* to be sustained by the evidence. *Ibid.*
4. An agreement between an insolvent debtor and two of his principal creditors, and transfers made by and pursuant thereto, constituting parts of the same transaction, whereby he transferred to them the greater part of his property, real and personal, and they assumed

the management of his business, in order to prevent a sacrifice of his property, and for the purpose of paying in a specified order their claims and the judgments and liens of other creditors, with provision for the reversion of any surplus to the debtor, are *held* to have constituted a voluntary assignment for the benefit of creditors, which, although not tainted with actual fraudulent intent, was constructively fraudulent and void as to creditors because not executed as the statute (sec. 1694, Stats. 1898) requires. *Ibid.*

5. Such transfers may be set aside in an action by judgment creditors of the insolvent, although their complaint does not specifically charge that the transaction constituted an unlawful voluntary assignment, where it alleges generally that all the transfers were executed as parts of one transaction, with the intent and purpose of having all the property held in trust for the use and benefit of the debtor contrary to law. *Ibid.*

6. Such agreement never having been recorded and not having come to the knowledge of the creditors attacking it until three or four years after its execution, up to which time there was nothing to inform them that the transferees were in possession in any other capacity than as mortgagees under prior valid and recorded mortgages, and reasonable diligence having been used thereafter in ascertaining the facts of the numerous transactions involved, a delay of nearly five years after the agreement was made before the commencement of the action is *held* not to have constituted laches which would bar the action. *Ibid.*

7. The fact that the transfers made by and pursuant to such fraudulent agreement were void did not avoid prior valid mortgages of the same property to the transferees, and, the agreement being set aside, they are restored to their legal rights under such mortgages. *Ibid.*

8. The mortgagees in such case having disposed of the mortgaged property pursuant to the void agreement, the plaintiffs are entitled to an accounting from them, to the end that the equity of redemption may be reached and applied to the satisfaction of plaintiffs' judgments. *Ibid.*

9. A finding of the trial court to the effect that the mortgagees had managed the property in the ordinary way of business and had made a *bona fide* effort to obtain as much as possible therefor, and that the net proceeds were insufficient to pay their claims, is *held* not conclusive, it appearing that both the debtor and the mortgagees supposed, at the time of the transfers, that the property was worth more than said claims and that a substantial surplus would be left for the debtor, and it further appearing that on the trial the parties agreed that it would be premature to go into a detailed accounting until the right thereto was settled, and that therefore no accounting was in fact had and very little testimony introduced. *Ibid.*

10. The action being in equity and defendants, the mortgagees, not being chargeable with actual fraudulent intent, equitable principles must prevail in the accounting. Defendants should have credit for sums necessarily paid to preserve the property and relieve it from liens, as well as expenditures reasonably and necessarily incurred in the diligent management of the business, but should not have credit for any sums paid to the mortgagor out of the proceeds of the business unless he actually earned the same by services rendered for defendants in the proper management of the business. *Ibid.*

11. Actual knowledge that one judgment ceditor of an insolvent has brought action to set aside as fraudulent a conveyance by the debtor does not, as matter of law, prevent the person having such knowledge from becoming, as against other creditors of whose claims he has no notice, a purchaser in good faith from the debtor's grantee. *Ibid.*

GARNISHMENT.

1. Standing timber was purchased under a contract providing that title and possession of the timber when cut should remain in the vendor until the whole contract price was paid. The purchaser sold a portion of the timber cut, and his vendees were garnished in an action against him before they had paid the purchase price and while they still retained possession of the timber. Before the garnishment they had been notified by the original vendor that he claimed the timber. More of the original purchase price remained unpaid than was due from the garnishees. *Held*, that the garnishment could not be maintained, and that it was immaterial that, after the service of the garnishee summons, the original vendor had transferred his rights, or what was the state of the accounts between his transferee and the principal defendant. *Bardon v. McCall*, 181

[2. Whether garnishment proceedings may be maintained in a state court against receivers appointed by a United States court, not determined.] *Ibid.*

GUARANTY. See BUILDING CONTRACTS, 1. CORPORATIONS, 6, 8.

GUARDIAN AND WARD.

See COSTS, 2. INSANE PERSONS.

Plaintiff purchased, at a guardian's sale, land upon which there was a past-due mortgage for which the estate of the ward was liable, but which was not mentioned either in the petition or order for sale. The sale was confirmed and the guardian directed to make a good, valid, and sufficient deed. He made the usual guardian's deed to plaintiff, without warranties, but agreed to pay the mortgage and have it discharged. He failed to do this, and embezzled the money received on the sale, and died insolvent. Thereafter plaintiff, who had conveyed the land by warranty deed, learned that the mortgage had not been paid, and paid it himself. Pursuant to the order authorizing the sale the guardian had given bond conditioned for the faithful performance of the trust, for paying over, investing, or accounting for all moneys received by him according to the order of any court having authority to give direction in the premises, etc. The statute (sec. 3515, R. S. 1878) provided that the court should make an order for the application and disposition of the proceeds of the sale, etc.; but no such order was made. In an action against the sureties on the guardian's bond, it is *held* that as against them there was no liability either to the ward or to the mortgagee resulting from the guardian's failure to pay the mortgage, and hence the plaintiff had acquired no right against them by subrogation. The agreement by the guardian to pay the mortgage, not having been authorized by the court, was his individual contract and not an official act. *Evison v. Hallock*, 249

HIGHWAYS.

See STREET RAILWAYS, 17-21.

1. Under secs. 1265-1269, Stats. 1898 (authorizing the supervisors of a town, upon proper petition and notice, to "lay out, alter, widen or discontinue any highway"), a new and separate highway with different termini cannot be laid out upon an application to alter an existing highway. *State ex rel. Funke v. Burgeson*, 174

2. The order altering a highway must, under sec. 1269, Stats. 1898, contain an intelligible description of it as altered. *Ibid.*

3. More than twenty years before the commencement of an action to restrain trespasses a logging road had been made at the place in question, which had been used at times in later years by persons logging in that neighborhood, and at times some settlers had hauled a few loads of hay over it. After nonuse for a number of years it had grown up to brush and was incumbered by windfalls. The town had never adopted it as a highway or done any work on it. *Held*, that the road had not become a highway by prescriptive use. *Marshfield L. & L. Co. v. John Week L. Co.* 268

HUSBAND AND WIFE. See FRAUDULENT CONVEYANCES, 1.

INEBRIETY. See COUNTIES, 1.

INFANTS. See ADOPTION. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 1-4. STREET RAILWAYS, 6-14.

INJUNCTIONS.

See APPEAL, 3-6. COUNTIES, 8-10.

1. Under secs. 2781 and 2814, Stats. 1898, the court cannot, except upon notice, vacate an injunctional order granted without notice by a court commissioner upon a complaint stating facts sufficient to give him a colorable right to make the order, even though such facts are not sufficient to warrant the interference of equity in plaintiff's behalf. *Marshfield L. & L. Co. v. John Week L. Co.* 268

2. An order restraining a lumbering corporation, a part of whose business was the handling of logs, from continued trespasses in building roads and hauling logs over lands owned by plaintiff, is not within the meaning of sec. 2780, Stats. 1898, which prohibits a court commissioner from granting an injunction "to suspend the general and ordinary business of a corporation." *Ibid.*

3. It is a general but not a universal rule that where all the equities of the complaint upon which a temporary injunction has been granted are specifically and positively denied by verified answer, the injunction will be dissolved. *Milwaukee E. R. & L. Co. v. Bradley*, 467

4. Such general rule does not apply where a continuance of the injunction is reasonably necessary for the protection of the rights of either party to the litigation during the pendency thereof. *Ibid.*

5. If it be clear that the plaintiff may probably recover, and that if he be left at the mercy of his adversary pending the litigation the purpose of such litigation may be defeated or he may probably suffer irreparable loss, it is within judicial discretion to so control the situation as to prevent that result so far as practicable, having regard for the probable rights of the defendant as well as those of the plaintiff. *Ibid.*

6. There is no arbitrary rule that displaces judicial discretion to control the conduct of parties to litigation so the purpose thereof will not be materially jeopardized. A refusal to exercise such power where there is clear necessity for it is either a misconception of judicial duty or an abuse of it. *Ibid.*

INSANE PERSONS.

1. Only with great hesitation should courts, by the appointment of a guardian, interfere with the discretion of elderly people, owing no legal duty of support to any one, in devoting the property accumulated by them to their comfort according to their own tastes. *In re Guardianship of Welch,* 387
2. If an appeal by an alleged incompetent person from an order of the county court appointing a guardian for him is taken before the guardian has qualified by giving bond as required by sec. 3981, Stats. 1898, service of notice of the appeal upon the attorney for the petitioners, in pursuance of an order of the court, is a sufficient compliance with sec. 4030 (requiring notice of appeal to be served on the *adverse party*), to give the circuit court jurisdiction of the appeal. *Ibid.*
3. Although, on questions of mental competency, a nonexpert witness who has related specific transactions with or conduct of the alleged incompetent may state by way of opinion the impression as to competency or incompetency conveyed to him by such conduct, the admission of such an opinion is largely discretionary with the trial court. *Ibid.*

INSOLVENCY. See BILLS AND NOTES. FRAUDULENT CONVEYANCES.

INSTRUCTIONS TO JURY. See CRIMINAL LAW, 4–7. STREET RAILWAYS, 16. TRIAL, 2–6.

INSURANCE.

Life.

1. Upon the evidence in an action upon a life insurance policy, it is *held* that there was an entire failure to prove any agreement that a note executed by the applicant should be taken in payment of the first premium, and that a verdict for defendant should have been directed on the ground that the insurance never became binding. *McDonald v. Provident S. L. A. Society,* 213

Benefit associations.

2. A benefit association claiming that a membership certificate has been forfeited by failure to pay an assessment must show affirmatively that the assessment was imposed in strict accordance with the insurance contract. *Miles v. Mut. R. F. L. Asso.* 421
3. Under the liberal rules, prevailing in this state, for the construction of pleadings, an allegation in an answer that an assessment was duly made sufficiently states that the conditions existed, and were properly so found, upon which the right to make the assessment depended, and that the assessment was made by proper authority. *Ibid.*
4. The constitution of a benefit association provided that on certain fixed dates, or at such other dates as the board of directors might determine, an assessment should be made on the entire membership for such sums as the executive committee might deem sufficient to meet the existing claims by death. *Held:*
   (1) Action by the board of directors was not required except in

fixing the time for making an assessment where it was to be made at a date other than one of the dates fixed by the constitution; and where the time had been so fixed the executive committee had power to make the assessment.

(2) The power of the executive committee was not limited to making such an assessment as was in fact necessary to satisfy the claims, but was a broad discretionary power to make an assessment for such sum as was necessary in their judgment to provide for such claims. *Ibid.*

5. Receipt of an overdue assessment on condition that the member was then in good health did not waive a forfeiture caused by the delinquency, where the member was not in good health and there was a prompt offer to return the money upon discovery of the facts. *Ibid.*

6. Under a policy providing for a reinstatement after forfeiture upon condition of the payment of all subsequent assessments, the making of a subsequent assessment does not operate as a waiver of the forfeiture. *Ibid.*

7. In an action upon a certificate of insurance the proofs of death furnished by the beneficiaries to the insurer and showing that deceased came to his death by suicide, were competent *prima facie* evidence of that fact against the beneficiaries. *Hart v. Fraternal Alliance*, 490

8. Upon the evidence in this case, including an admission of suicide in the proofs of death, it is *held* that the fact of suicide was conclusively proven and that a verdict to the contrary was wholly unsupported. *Ibid.*

9. By the terms of a certificate of insurance the insurer was not liable in case of suicide, except for the amount of premiums paid by the insured; and it was stipulated that in case of an inquest a certified copy of the evidence, verdict, and proceedings therein should be attached to the proofs of death. *Held*, that such stipulation was reasonable, and compliance therewith was necessary to give a right of recovery. *Ibid.*

10. A denial of liability by an insurer, made after the expiration of the time for furnishing proofs of death and when it could not in any way have influenced the action of the beneficiaries with respect to such proofs, does not operate as a waiver of defects in the proofs furnished. *Ibid.*

Fire.

11. After a loss under a Michigan standard fire policy providing that in case of disagreement the amount of loss should be submitted to appraisers whose award should be *prima facie* evidence of such amount, the parties signed a written agreement for submission to appraisers, providing that their award should be *binding and conclusive*. In an action on the policy the evidence is *held* not to sustain plaintiff's contention that said agreement was procured by defendant's representation that it was such an agreement as was provided for in the policy and that both parties so construed and acted upon it. *Montgomery v. Am. Cent. Ins. Co.* 146

12. In the absence of fraud or mistake the insured is conclusively presumed to have known the contents of the appraisal agreement. *Ibid.*

13. Such an appraisal agreement, though providing that the award should have an effect different from that provided for in the standard policy, is not void on the ground that it is contrary to the pol-

icy of the law (How. Ann. Stats. Mich. ch. 137) under which the standard policy was adopted, which prohibits the use of any other form of policy and provides that "every policy or contract made or issued contrary to the provisions of this act shall be void." Neither that statute nor the standard policy precludes the parties from contracting, after a loss, with reference to its settlement. *Ibid.*

14. Such an appraisal agreement may be made by a married woman under the laws of Michigan, which authorize married women to acquire and hold property and to make contracts in relation thereto and to sue and be sued in relation thereto the same as if unmarried. *Ibid.*

15. An award of the appraisers under such an agreement, though not a statutory award because not in accordance with the statutes relating to the subject, may nevertheless, if otherwise unobjectionable, be enforced as a common-law award. *Ibid.*

16. Such an appraisal agreement need not be based upon any new consideration. *Ibid.*

17. The provision of such an agreement that the award shall be binding and conclusive as to the amount of loss since it does not go to the whole groundwork of the controversy, does not render the agreement void as against public policy on the ground that it ousts the courts of jurisdiction. *Ibid.*

18. At the time of the issuance of a fire insurance policy, under sec. 1931, Stats. 1898, covering hay and grain "on premises," the insured had hay and grain on the premises mentioned in his application, and had no other premises. Afterwards, still retaining such premises and having hay and grain thereon, he rented a farm in another section, and his hay and grain on the latter were destroyed by fire. *Held*, that the policy did not cover such loss. *Brandt v. Berlin F. M. F. & B. V. Co.* 231

Employer's liability.

19. A policy, insuring against liability on account of any injuries sustained by employees of the assured resulting from an accident happening to such employee while engaged in the service of the assured in connection with a certain factory, provided that "if any child is illegally employed on the work of the assured, the company will not be liable for any injuries which may be thereby sustained or occasioned." *Held*, that no recovery could be had thereunder for an injury to a child under twelve years old employed in violation of sec. 1728*a*, Stats. 1898, even though the injury was not the proximate result of the illegal employment. *Goodwillie v. London G. & A. Co.* 207

INTENT to injure. See NEGLIGENCE, 4–6. RAILROADS, 5, 6. STREET RAILWAYS, 10, 14.

INTEREST.

In an action upon an account stated the inclusion, in a verdict directed by the court, of interest to which plaintiff was entitled, but which was not computed by any witness, was not error. *Rochester M. T. Works v. Weiss,* 545

JOINDER.
Of causes of action. See EXECUTORS, 2 (3).
Of parties. See PLEADING, 1.

JOINT TORT FEASORS. See TORTS.

JUDGMENT.

Offer of judgment. See COSTS.

On pleadings. See APPEAL, 8.

1. Where parties submit a cause for trial on the pleadings, a final judgment is properly rendered; and upon a reversal thereof the appellate court will direct the proper judgment, not a new trial. *Sanderson v. Herman,* 662

On setting aside verdict.

2. Where plaintiff's right of recovery is clear upon the undisputed evidence, the trial court, upon setting aside a verdict for defendant, may render judgment for plaintiff. *Dowagiac Mfg. Co. v. Schroeder,* 109

On disclaimer. See EJECTMENT, 1.

In ejectment: Upon whom binding: Lis pendens. See EJECTMENT, 1, 4.

Of foreclosure: Lis pendens. See MORTGAGES, 1, 3.

For deficiency: Against whom. See MORTGAGES, 2.

Distributing estate. See EXECUTORS, 2, 3.

On concurrent remedies: Merger and bar of causes of action.

3. As a general rule, a person may pursue to judgment as many consistent remedies as he has for the same wrong, but can have but a single satisfaction. That satisfies one judgment directly and indirectly extinguishes all causes of action for the wrong and judgments rendered therefor. *Barth v. Loeffelholtz,* 563

4. The above-stated general rule does not apply where consistent remedies are pursued for the same wrong, there being identity of parties and identity of amount recoverable, such amount reaching a full compensation for such wrong. In such circumstances a judgment in one action is deemed by judicial policy to draw to and merge in it all causes of action so that it may be pleaded in the other actions as a bar to the prosecution thereof. *Ibid.*

Vacating and setting aside. See APPEAL, 1. EXECUTORS, 2, 3. MORTGAGES, 1.

Reversal on appeal. See APPEAL, 14–16.

In supreme court: Directing new trial. See APPEAL, 17. JUDGMENT, 1.

Conclusiveness of adjudication. See EJECTMENT, 1, 4. OFFICERS.

JUDICIAL NOTICE. See LOGS AND LUMBER, 3.

JURISDICTION. See ADOPTION. ATTACHMENT, 1. COURTS. GARNISHMENT, 2. INSANE PERSONS, 2. INSURANCE, 17.

LACHES. See ATTACHMENT. CORPORATIONS, 4. EXECUTORS, 3. FRAUDULENT CONVEYANCES, 6. MUNICIPAL CORPORATIONS, 2.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See CONTRACTS, 2.

1. Defendants, being entitled to a half interest in land the title to which was in plaintiff, leased the whole tract for a term of years, one half of the first year's rent to be paid by clearing the land. *Held,* that plaintiff could not, under any circumstances, recover from defendants, in an action for money had and received, his share of the rent so paid. *Hassard v. Tomkins,* 186

2. Although the lease in such case was made without direct authority from plaintiff, he became aware of its terms after it was made, received payments thereon, and treated the lessee as his tenant. *Held*, that he thereby ratified the lease as made. *Ibid.*

3. Under secs. 2204, 2242, Stats. 1898, there are no implied covenants in a lease for a term exceeding three years. A statement to the contrary in *Shaft v. Carey*, 107 Wis. 273, not necessary to the decision of that case, is withdrawn. *Koeber v. Somers*, 497

4. In an action to recover rent defendant counterclaimed upon a promise made prior to the leasing to put the premises in first-class condition, alleging insufficiency of the heating apparatus as a breach. The counterclaim was amended so as to allege that prior to the leasing plaintiff had knowingly made false statements as to the sufficiency of such heating apparatus, to induce defendant to enter into the lease, and that defendant relied thereon. *Held*, that this was not intended to change the cause of action to one in tort, but merely to negative any inference of intended waiver of the alleged pre-existing contract as a result of the making of the lease. *Hunter v. Hathaway*, 620

5. The alleged promise to put the premises in first-class condition was made by a real-estate agent who had been asked by plaintiff to find a tenant for the house and whom defendant had asked to find a house for him, but there was no evidence that plaintiff had authorized the making of such promise or even knew of it. *Held*, that there could be no recovery thereon. *Ibid.*

6. The evidence as to damages in support of such a counterclaim should show not merely that defendant was inconvenienced in or deprived of the use of a part of the house, or that he burned a large amount of coal, because of the insufficiency of the heating apparatus, but should show the effect of such inconvenience or deprivation on the rental value of the premises, and the value of the extra coal consumed. *Ibid.*

7. It appeared, in such case, that the letter of the agent which contained the promise that plaintiff would put the house in first-class condition was a mere preliminary proposal, and that after further negotiations the parties "concluded a bargain" and, after the work on the house was completed, executed a lease for more than three years. *Held*, that all previous negotiations were merged in the lease, and that under sec. 2204, Stats. 1898, no covenants as to the condition of the house were implied therein; so that there was no contract to support the counterclaim. *Ibid.*

LIBEL AND SLANDER.

1. A newspaper publication stating that "there is a general supposition that" plaintiff and another "have, by means of their wealth and political power, obtained absolute control of the mayor and a majority of the councilmen" of a city, that "the officers thus directly or indirectly bought are held in much public contempt," but "the men who did the buying have in no wise lost caste," and plaintiff continues to be an honorable leader in social circles — is not a report of any "public official proceeding," within the meaning of sec. 4256*a*, Stats. 1898, and is libelous *per se*. *Pfister v. Sentinel Co.* 572

2. Officers, stockholders, or members of a publishing corporation are not liable for a libelous publication simply because of official position or membership; but if they in any way aided, assisted, or ad-

vised its publication or circulation, or their duties as officers or agents were of such a character as to charge them with the performance of functions concerning the publication and circulation of the paper, such duties being of such nature that the law implies that such officers or agents knew or ought to have known of the publication, they are liable and cannot defend on the ground merely that they did not know about the libel until after it was published. *Ibid.*

8. In an action for libel the complaint, liberally construed, charged that certain defendants, who constituted a majority of the directors of a newspaper corporation, had caused the corporation, through its newspaper, to adopt a policy of bitter opposition to a proposed ordinance relating to a street railway company; that in following out this policy they had caused violent and inflammatory articles to be published defamatory of the plaintiff and insinuating that he was guilty of criminal and unlawful methods in attempting to secure the passage of the ordinance, and had been guilty of bribery; and that in further continuance thereof they caused the false and defamatory matter in question to be published and circulated. *Held*, that a cause of action was stated against said directors. *Simonsen v. Herold Co.* 61 Wis. 626, distinguished. *Ibid.*

LICENSE to use logging road. See CUSTOMS.

LIENS.

Of mechanics, etc., for labor and materials. See CORPORATIONS, 8.

1. In an action to enforce a subcontractor's lien under the statutes of this state, the owner of the property affected is entitled to the benefit of all the defenses against the claim possessed by the principal contractor. *Seeman v. Biemann*, 365

2. If a building contract stipulate that there shall be no liens filed upon the building under the lien laws of this state, a subcontractor will be held to be a party thereto and bound thereby. *Ibid.*

3. An agreement in a building contract that the contract price shall in whole or in part be retained by the owner till all lienable claims be paid, or that it shall constitute a trust fund to pay them, recognizes the probability of there being such claims rather than stipulates that no liens shall be filed. *Ibid.*

4. The fact that the principal contractor has not complied with the conditions of his contract so as to enable him to enforce a lien on the building, will not militate against the subcontractor enforcing such a lien if the subject of the subcontractor's lien might in any event be lienable in favor of the principal contractor. *Ibid.*

5. So long as a builder under a building contract keeps within the scope of his contract, as regards material and labor wrought into the building and the character of such building, he is deemed to be the accredited agent of the owner to incur indebtedness therefor, and the circumstance that the amount of such indebtedness exceeds the contract price of the building or is due to a subcontractor before the maturity of the principal contract, does not militate against said subcontractor enforcing his claim under the lien statutes. *Ibid.*

6. Damages for breach of contract in the construction of a building, recoverable by a principal contractor or by a subcontractor, do not constitute a lienable claim. *Ibid.*

7. The rule that there must be an improvement on land, satisfying the calls of the statute in that regard, in order that a lien may attach to such improvement and in connection therewith to the interest of the owner of the land upon which it is located, and that for want of such circumstance a principal contractor cannot have a lien upon the property, and that his subcontractor has no greater right, does not require a principal contractor to be so circumstanced that he can enforce a lien in order that his subcontractor may do so. The rule goes to the lienability of the claim, not to its enforcement. *Ibid.*

8. A surety for the performance of a building contract cannot claim a lien on the building for materials furnished to the contractor. *Interior Woodwork Co. v. Prasser,* 557

On logs and lumber.

9. Although horses were rented for the express purpose of being used in work of a lienable nature upon logs, the owner is not entitled to a lien for their hire, under sec. 3329, Stats. 1898, unless they were used and worked by him or by some person as his agent or servant. *Edwards v. H. B. Waite Lumber Co.* 164

LIFE INSURANCE. See INSURANCE, 1–10.

LIMITATION OF ACTIONS.

See ACTION, 1. CORPORATIONS, 4. EXECUTORS, 3. LIS PENDENS, 1. MASTER AND SERVANT, 4. TAXATION, 4.

1. After the open, notorious surrender by an administrator of real estate of his decedent, pursuant to a sale thereof for the purpose of paying debts, he has no trust relation thereto which precludes the running of the statute of limitations against an action to set aside the sale on the ground that the administrator was interested therein. *Gibson v. Gibson,* 102

2. An action to set aside an administrator's sale of land for fraud is not an action "for the recovery of real property," within the meaning of sec. 4218, Stats. 1898, but the period within which the action must be brought is prescribed by sec. 4221, and under sec. 4233 it cannot be extended, because of the infancy of the person entitled to sue, longer than one year after such disability ceases. *Ibid.*

3. Under sec. 3841, Stats. 1898, the statute of limitations need not be pleaded as to a claim against the estate of a decedent. *Martin v. Estate of Martin,* 284

4. Subd. 7 of sec. 2649, and sec. 2651, Stats. 1898, permit a complaint to be demurred to because the action was not commenced within the time required by law, only upon condition that the particular section of the statute of limitations or subdivision of a section relied upon be thereby specifically pointed out. *Whereatt v. Worth,* 291

5. The court has the same discretionary power to permit an amendment to a pleading setting up the statute of limitations as to permit any other defense to be so pleaded. *Ibid.*

6. The doctrine that the bar of the statute of limitations extinguishes the right involved and creates a new one in the adverse party which is in the nature of property, within the meaning of that term as understood in respect to constitutional guaranties, is not in harmony with the doctrine that the defense of the statute of limitations is unconscionable and that a trial court may, in the exercise of its discretionary power, on that ground alone, refuse in all cases to permit it, where its availability depends upon judicial favor. *Ibid.*

7. The judicial policy that regards statutes of limitations in an unfavorable light and defenses under them unconscionable, is not in accord with the legislative policy. The latter ought to prevail. *Ibid.*

8. In a matter properly regarded as purely discretionary with the trial court, its action, reasonably in accord with a supreme judicial rule, will not be disturbed to satisfy the necessities of a particular case, though the rule itself be so discountenanced as to in effect change it. *Ibid.*

9. In accordance with the principles stated, the decision of the trial court, refusing to permit a demurrer to be amended so as to cure an excusable and excused mistake in respect to pleading the statute of limitations, is affirmed, while the reason upon which the decision is grounded is discountenanced so far as being a safe guide for future judicial administration. *Ibid.*

LIQUIDATED DAMAGES. See DAMAGES, 2.

LIS PENDENS.

See APPEAL, 1. EJECTMENT. MORTGAGES, 1, 3.

1. Under secs. 4239, 4240, Stats. 1898, a person not a party to an action as originally brought, but then possessed of an independent right in the subject thereof, cannot be bound by the filing of a notice of the pendency of such action under sec. 3187, as regards the right to the benefit of the statute of limitations, it being provided in the section first mentioned that an action shall be deemed commenced as against a defendant, as regards any statute of limitations, when the summons shall have been served upon him or a defendant united with him in interest or there has been a *bona fide* attempt to make such service by delivery of the summons to the proper officer for service with the intention that it shall be served. *Webster v. Pierce,* 407

2. A notice of *lis pendens* is constructive notice only of the proceedings in the action in which it is filed and of the rights of the parties to that action. *Kickbusch v. Corwith,* 634

LOGS AND LUMBER.

See CUSTOMS. GARNISHMENT. HIGHWAYS, 3. INJUNCTIONS, 2. LIENS, 9.

1. Upon the evidence (stated in the opinion) in an action to recover the value of timber unlawfully cut, a finding as to the value per thousand feet is left undisturbed, but a finding as to the quantity taken, based on a full scale of all the timber cut as if it were sound, straight, and entirely merchantable, is *held* unwarranted, and the maximum amount for which defendants should have been held liable is determined. *Midlothian I. M. Co. v. Belknap,* 198

2. A contract for the sale of lumber is construed to have been for the sale of all the lumber capable of being manufactured from the entire body of timber described therein, and not merely of so much of said lumber as the vendor might choose to manufacture and deliver. *Brittingham & H. L. Co. v. Manson,* 221

3. The fact that a merchantable scale of pine timber, even of such as is practically all sound, is considerably less than the full scale, not being a matter of common knowledge, the courts cannot take judicial notice thereof. *Davies v. Jeffris,* 244

4. In an action for the wrongful cutting of pine timber the preponderance of the evidence being to the effect that no deduction from the full scale was necessary to arrive at the merchantable scale, a finding as to the quantity for which defendants were liable, making little or no deduction for the difference between such scales, is sustained. *Ibid.*

5. In such a case plaintiff's witnesses fixed the value of the timber cut at from $3.50 to $5 per thousand, and defendant's witnesses estimated its value at from $1 to $2 per thousand. *Held* that, the difference in the estimates not being explainable on the theory of a mere difference in judgment, a finding fixing the value at $4 per thousand would not be disturbed. *Ibid.*

6. The term "price," used by witnesses testifying in respect to timber unlawfully cut, is *held* to have been used in the sense of "market value." *Ibid.*

MANDAMUS.

See MUNICIPAL CORPORATIONS, 1, 2.

Mandamus to compel a circuit judge to vacate an order changing the venue of an action is denied, complete and direct relief being obtainable, if relator is entitled to it, upon *certiorari*. *State ex rel. W. G. Taylor Co. v. Elliott*, 163

MARRIED WOMEN. See INSURANCE, 14.

MASTER AND SERVANT.

Contract of employment: Members of family: Defective adoption.

1. Where a niece of the decedent became a member of his family during her infancy, she cannot recover against his estate for her services without proving an express promise on his part to pay her therefor; but such promise may be established by admissions of the decedent and by circumstantial evidence confirmatory thereof. *Leitgabel v. Belt*, 107

2. Where a boy was received into a family as a son, under defective adoption papers, and rendered services in that capacity, the presumption that such services were not to be paid for can only be rebutted by proof, either direct or circumstantial, which establishes an express contract to pay for them. *Martin v. Estate of Martin*, 284

3. An oral contract in such case whereby, in consideration of his mother's consent to the adoption of the boy and of his services to be rendered as an adopted son, the person intending to adopt him agreed that she would give him all her property, real and personal, at her death, is void as to the real property under the statute of frauds and, being indivisible, is wholly void; but such a contract nevertheless rebuts the presumption that the services of the boy were to be gratuitous. *Ibid.*

4. When, in such case, the services of the boy had ceased and he had attained his majority, he could, if entitled to recover at all, have made his demand and brought action for the value of his services, the void contract being no defense and of no effect to extend the time of payment; and the statute of limitations began to run accordingly. *Ibid.*

Injuries to servants: Negligence of fellow-servants: Contributory negligence. See RAILROADS, 1-3. STREET RAILWAYS, 22.

5. In an action for injuries sustained by plaintiff while operating a wood-embossing machine, caused by an explosion of gasoline gas, which was used in heating the metal dies of the machines, a finding in the special verdict to the effect that the explosion was caused by leakage of the pipes under the floor of the small building in which plaintiff was working, which conveyed gasoline from an outside tank through the inclosed space beneath the floor and up through the floor to the machines, is *held* unsupported by the evidence, which fails to show affirmatively that there was any such leakage and shows conclusively that there was neither explosion nor combustion beneath the floor. *Musbach v. Wis. Chair Co.* 57

6. It having been shown that a co-employee of plaintiff was in the habit of permitting gasoline to drip from the burner of his machine after it had been extinguished, and that enough gas might have been formed in the room in that way to account for the explosion, there could be no presumption, from the mere fact of the explosion, that there was any defect in the apparatus supplying the gasoline, but the burden was upon plaintiff to show by a preponderance of reasonably direct evidence the existence and proximate efficacy of such a defect; and it was error therefore, even upon the assumption that the accident might have been caused either by a defect or by the co-employee's negligence, to submit those two possible causes to the jury, for the adoption of one or the other, as if they stood on an entire parity as to *quantum* of proof necessary to give either its legal effect. *Ibid.*

Insurance against employer's liability: Illegal employment of minor. See INSURANCE, 19.

MAXIMS.
Damnum absque injuria, 545.
De minimis non curat lex, 671.
Qui facit per alium facit per se, 166.
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MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS. See LIENS, 1-8.

MERGER.
Of causes of action. See JUDGMENT, 4.
Of prior negotiations in lease. See LANDLORD AND TENANT, 7.

MINORS. See ADOPTION. LIMITATION OF ACTIONS, 2. MASTER AND SERVANT, 1-4. STREET RAILWAYS, 6-14.

MISTAKE. See CONTRACTS, 4. EXECUTORS, 2, 3. REFORMATION OF INSTRUMENTS.

MONEY HAD AND RECEIVED. See LANDLORD AND TENANT, 1.

MORTGAGES.

See APPEAL, 1. CHATTEL MORTGAGES. FRAUDULENT CONVEYANCES, 2, 3, 7-10. GUARDIAN AND WARD. PLEADING, 2.

1. A judgment of foreclosure of a mortgage, entered without compliance with the requirement of sec. 3187, Stats. 1898, that a notice of *lis pendens* shall be filed twenty days before judgment, is irregular but not void, and the court has no power to set it aside, because of such irregularity, at a subsequent term. *State ex rel. Fuller v. Circuit Court,* 77

2. One who executes a deed under seal, containing a covenant on his part, jointly with the grantor of the land conveyed by the deed, to pay a certain mortgage on the land, becomes thereby "personally liable for the debt secured by the mortgage" and "upon the same contract which the mortgage is given to secure," within the meaning of sec. 3156, Stats. 1898; and upon foreclosure of the mortgage judgment for deficiency may go against him. *Kuener v. Smith*, 549

3. In an action to foreclose a second mortgage on land judgment was entered the day after the commencement of suit to foreclose the first mortgage, and before a notice of *lis pendens* had been filed in the latter action, but the sale on said judgment took place after the filing of such notice. The holders of the second mortgage were not made parties to the action to foreclose the first mortgage. *Held*, that the purchasers at the sale on foreclosure of the second mortgage were not affected by the filing of the notice of *lis pendens*, but obtained the legal title and right to the possession of the land, and that the purchaser at the sale on foreclosure of the first mortgage obtained no possessory right as against such title. *Roosevelt v. Land & River Co.* 653

MUNICIPAL CORPORATIONS.

Public works: Contracts: Mandamus.

1. Where no "plan or profile of the work to be done" had been placed on file, as required by the city charter of Milwaukee (sec. 9, subch. V, ch. 184, Laws of 1874), at the time of advertising for proposals for a public work or improvement, the board of public works will not be compelled by *mandamus* to enter into a contract for the work, even though the council has accepted a proposal therefor and directed the board to make the contract. *State ex rel. O'Donnell v. Benzenberg*, 435

Same: Determination of damages: Laches.

2. Sec. 113 of the city charter of Superior (ch. 124, Laws of 1891) authorizes the board of public works to change the established grade of any street, but provides that the owner of abutting property may recover his damages in the manner set forth in the charter. Sec. 119 provides that *before* any established grade shall be changed the board shall determine the damages and benefits which will accrue to each parcel of real estate. Proceedings for the construction of a viaduct changing the established grade in front of the relator's premises were instituted in July, 1899, and the work was done shortly thereafter, without any action being taken to determine his damage. He was fully cognizant of what was being done, but made no protest and no demand to have the damages determined until in March, 1900, several months after the viaduct had been completed and opened for travel. *Held* that, because of his laches, it was proper to refuse to compel the city authorities by *mandamus* to proceed to determine the damages. *State ex rel. Taylor v. Superior*, 16

3. The right to damages in such case being entirely statutory, and the charter providing a way in which they shall be ascertained, *quære* whether such remedy is not exclusive. *Ibid.*

Street improvements: Change of grade: Assessments: Reassessment.

4. A special assessment for a street improvement, which was held invalid because damages from change of grade were not determined at the same time, as required by the Milwaukee city charter, is

within the purview of ch. 262, Laws of 1897, and secs. 1210*d*–1210*f*, Stats. 1898, providing for a reassessment when a special assessment is invalid "by reason of failure to observe any provision of law, or by reason of any act or defect in the proceedings upon which such special assessment . . . is based." *Sanderson v. Herman*, 662

5. The certificate of the board authorized to make a reassessment that they viewed each lot and considered and determined, as to the same, both the benefits and damages, costs, etc., less benefits resulting from change of grade, is not overcome by the mere fact that each lot of the same size is determined to have received the same benefit, especially when it appears that all the lots were used and affected substantially alike. *Ibid.*

6. A statute (ch. 262, Laws of 1897, re-enacted in secs. 1210*d*–1210*f*, Stats. 1898) authorizing a reassessment when a special assessment is invalid, is not unconstitutional if it does not omit any requirement or condition which the legislature could not have dispensed with as prerequisite to the original assessment. *Ibid.*

7. The declaration of the assessing board that a reassessment was made by them in compliance with ch. 262, Laws of 1897, which before the completion of their proceedings had been re-enacted in and superseded by secs. 1210*d*–1210*f*, Stats. 1898, is immaterial, where the proceedings complied with both acts, and each (whichever was in force) authorized them. *Ibid.*

8. Whether, under the Milwaukee city charter, an attempted change of the established grade of a street by resolution, without any petition therefor, is of any force, and, if not of force, whether the city had power to improve the street to other than the old grade at the expense of lotowners, is immaterial, where there was practically no change in the actual grade, the increased elevation of the new pavement being very slight and only in the center of the street, and not involving expense in grading the street but, on the contrary, avoiding the expense of cutting it down for the new pavement. *Ibid.*

Public schools: Death of pupil from defects: Liability.

9. In maintaining its public schools a city is performing merely a public duty, and it is not liable for the death of a pupil caused by sewer gas escaping into the school building from a sewer therein which had negligently, and with knowledge of the city authorities, been allowed to become out of repair and clogged up. *Folk v. Milwaukee*, 359

NATURALIZATION. See OFFICERS.

NEGATIVE TESTIMONY. See STREET RAILWAYS, 9.

NEGLIGENCE.

See CONTRACTS, 1. MASTER AND SERVANT, 5, 6. RAILROADS. STREET RAILWAYS. TRIAL, 1.

1. To establish liability for an injury on the ground of negligence a special verdict, besides finding the particular things in which the defendant was negligent, should also find that such negligence was the proximate cause of the injury. *Wills v. Ashland L., P. & S. R. Co.* 255

2. The submission of a question as to whether the defendant was "guilty of such want of ordinary care as to be the direct or proximate cause of the injury," together with instructions to the effect

that the words "direct" and "proximate" mean about the same thing, was error. *Ibid.*

3. In an action to recover damages claimed to have been caused by actionable negligence of the defendant, contributory negligence of the plaintiff, however slight, precludes his recovering damages, notwithstanding negligence of the defendant, however great, contributed thereto. *Bolin v. C., St. P., M. & O. R. Co.* 333

4. If a person injure another, either actually or constructively intending to do so, the injury is not attributable strictly to negligence, but to that degree of misconduct called wilful misconduct in the law, which this court has classed as gross negligence, though it has no element of inadvertence, a necessary element of negligence. *Ibid.*

5. If an injury be wilfully inflicted within the meaning of the rule last stated, contributory negligence on the part of the injured person will not preclude his recovering damages therefor; neither will the act that he was, at the instant of receiving such injury, a wilful trespasser upon the property of the person guilty of the wilful act. *Ibid.*

6. It is not sufficient to warrant a reasonable inference of that intent necessary to a wilful injury to show that the alleged guilty party ought reasonably to have anticipated that such a result was merely within reasonable probabilities, else mere want of ordinary care would have that effect. To warrant such inference the circumstances must be such that a man of ordinary intelligence would expect such an injury to occur. *Ibid.*

7. The rule that if plaintiff was placed in a situation of danger by defendant's negligence, and was compelled to choose one of several lines of action in the presence of imminent danger, the fact that he did not choose the best means of escape does not charge him with negligence, is not applicable to a case where plaintiff, by his own negligence, had placed himself in the position of danger. *Dummer v. Milwaukee E. R. & L. Co.* 589

8. The doctrine of comparative negligence does not prevail in this state. *Tesch v. Milwaukee E. R. & L. Co.* 593

9. The doctrine in this state is that contributory negligence of the plaintiff, however slight, precludes his recovering of the defendant on the ground of negligence, regardless of the degree thereof, speaking of conduct characterized by inadvertence, not that misconduct known in the decisions of this court as gross negligence. *Ibid.*

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEWSPAPERS. See LIBEL.

NEW TRIAL.

See APPEAL, 17. JUDGMENT, 1.

1. The issue being whether plaintiff was to receive, for looking after defendant's vacant buildings, etc., compensation in addition to the use of one of such buildings as a dwelling rent free, the failure of defendant, previous to the trial, to interview a clerk employed by him in a store about six miles distant, at which plaintiff traded, to ascertain what such clerk knew concerning the case, is *held* such a lack of diligence as to justify the denial of a motion for a new trial based on an alleged discovery that plaintiff had made admissions to such clerk. *Scott v. Hobe,* 239

2. In an action upon an account stated the denial of a motion for a new trial on the ground of newly discovered evidence, consisting of a letter from plaintiff which it is claimed tends to dispute the justice of an item in the account, is *held* not an abuse of discretion. *Rochester M. T. Works v. Weiss,* 545

3. In an action by son against father, both being physicians, for plaintiff's services in consulting with defendant in his practice, it is *held* that a verdict for $11,000, which the trial court reduced to $6,000, did not represent that calm, fair, and impartial consideration which should characterize the decision of questions of fact; that passion and prejudice probably affected the decision, not merely of the question of damages, but also of the other questions in the case; and that therefore the trial court should have granted a new trial absolutely. *McNamara v. McNamara,* 613

NONRESIDENTS. See OFFICERS.

NOTICE.
Of entry of order. See APPEAL, 3.
Of appeal. See APPEAL, 4. INSANE PERSONS, 2.
Of fraud. See FRAUDULENT CONVEYANCES, 6, 11.
Of motion. See INJUNCTIONS, 1.
Of pendency of action. See LIS PENDENS.
Of sale of land for taxes. See TAXATION, 3.

NUISANCES. See MUNICIPAL CORPORATIONS, 9.

OFFICERS.

Proceedings to try title: Nonresidents: Naturalization: Res adjudicata.

On November 18, 1898, appellant became a citizen of the United States by the judgment of a district court of the state of Minnesota rendered on evidence as to his residence in that state to the effect that he had resided there continuously for the year immediately preceding his application; and in September, 1899, pursuant to an appointment to the office of lumber inspector of the Thirteenth district of Wisconsin, then held by the relator, he formally qualified therefor, and thereupon demanded possession of the books and papers of the office, which demand was complied with, the relator supposing appellant to be eligible to the office. Thereafter the relator was informed that appellant was not an elector of the state of Wisconsin, and thereupon he commenced this action to regain possession of the office upon the ground that he was entitled thereto till a person should be appointed and should qualify who was eligible to the position. The cause was tried by the court with a jury. The record of the proceedings of the Minnesota court was received in evidence against a general objection, and was held conclusive upon appellant on the question of his eligibility to the office. *Held:*

1. Proceedings to try the title to an office constitute a civil action in which controverted questions of fact are triable by a jury as a matter of right.

2. The record of the naturalization proceedings was properly received in evidence, (a) as an admission against interest, (b) as a former adjudication as to a material fact, hence binding upon the appellant.

3. The naturalization proceedings were in effect an action *in rem* and the result binding upon the world not only as to the ultimate fact established but the facts upon which such result was based.

4. It appearing conclusively that the adjudication of citizenship by the Minnesota court, as to residence in the state of Minnesota, was based wholly on proof of a year's residence there immediately preceding the making of the application for citizenship, the truth thereof was vital to the conclusion reached, and the decision on that point necessarily became a part of the judgment and is as binding upon appellant as the judgment itself, regardless of whether the federal statute calls for the particular year's residence covered by the proof or not.

5. The conclusiveness of the judgment of the Minnesota court is ruled by the doctrine regarding judgments *in rem* and the rule that the *res adjudicata*, as to a final judicial determination, extends to every proposition assumed or decided by the court upon which the final conclusion is based. *State ex rel. Atkinson v. McDonald*, 8

County officers. See COUNTIES, 1, 2.

County clerk and treasurer. See TAXATION, 2.

District attorney. See CRIMINAL LAW, 2.

Of bank. See BANKS AND BANKING.

Of other corporations. See CORPORATIONS, 5-7. LIBEL AND SLANDER, 2, 3. WITNESSES, 1.

OPINION evidence. See INSANE PERSONS, 3.

PARENT AND CHILD.

See ADOPTION. MASTER AND SERVANT, 2-4.

In an action by a parent to recover for loss of the services of a minor child, evidence as to the parent's pecuniary condition, the amount of his property, his earnings, and the size of his family, is inadmissible. *Holdridge v. Mendenhall*, 1

PARTIES. See CORPORATIONS, 3, 7. COUNTIES, 8-10. EXECUTORS, 2 (3). PLEADING, 1. SALES, 4. TORTS. VENDOR AND PURCHASER, 2. WILLS, 2. WITNESSES, 1.

PAUPERS. See COUNTIES, 1.

PAYMENT.

See BILLS AND NOTES, 5. INSURANCE, 1.

1. A written receipt, signed by a corporation and acknowledging payment of an account, though contradicted, after the death of the debtor, by several witnesses, officers of the corporation, is *held* sufficient evidence of payment to carry that question to the jury. *Twohy Mercantile Co. v. Estate of McDonald*, 21

2. The words "Received payment in full," written at the foot of a bill specifying the amount due, do not make it anything more than a mere receipt, which may be explained, varied, or contradicted by parol. *Ibid.*

3. An order directing the drawee to pay money to a third person and charge it to a certain account between the drawer and drawee becomes, when accepted and paid, a contract definitely applying the money paid to said account. *Hassard v. Tomkins*, 186

PENALTY or liquidated damages? See DAMAGES, 2.

PERPETUITIES. See WILLS, 3.

PHYSICIANS AND SURGEONS. See NEW TRIAL, 3.

PLACE OF TRIAL. See MANDAMUS.

PLEADING.

See ADOPTION, 1. APPEAL, 8, 10. BANKS AND BANKING. CHAMPERTY, 2. CHATTEL MORTGAGES, 3. CORPORATIONS, 1, 3. CRIMINAL LAW, 3. FRAUDULENT CONVEYANCES, 5. INSURANCE, 3. JUDGMENT, 1. LANDLORD AND TENANT, 4. LIMITATION OF ACTIONS, 3–9.

1. A demurrer on the ground that there is a defect of parties, which fails to state whether the defect consists in the omission of a plaintiff or a defendant or to name the person who should be made a party, is insufficient under secs. 2649, 2651, Stats. 1898, to raise that question. *Emerson v. Schwindt,* 167

2. After the commencement of an action upon an open account the defendant therein brought an action to foreclose a mortgage executed to him by the plaintiff and not put in issue by the pleadings in the former action. On the trial of the former action, while the foreclosure action was still pending and undetermined, the mortgagor was allowed to give evidence tending to prove that the note secured by the mortgage had been fully paid and satisfied. *Held,* improper. *Weille v. Reinhard,* 72

PLEDGE of corporate stock. See CORPORATIONS, 3, 4.

POSITIVE and negative testimony. See STREET RAILWAYS, 9.

POSSESSION. See CHATTEL MORTGAGES. MORTGAGES, 3. TAXATION, 4. VENDOR AND PURCHASER, 3.

PRACTICE. See ACTION. APPEAL. ATTACHMENT, 1. CERTIORARI. CHAMPERTY, 2. COSTS. CRIMINAL LAW AND PRACTICE. INJUNCTIONS. INSANE PERSONS, 2. INTEREST. JUDGMENT. LANDLORD AND TENANT, 4. LIS PENDENS. MANDAMUS. MORTGAGES, 1. NEW TRIAL. PLEADING. PROCESS. TRIAL. VERDICT.

PRESCRIPTION. See HIGHWAYS, 3.

PRESUMPTIONS. See ADOPTION, 2. BUILDING CONTRACTS, 2. CRIMINAL LAW, 5, 6. INSURANCE, 12. MASTER AND SERVANT, 1–3.

PRINCIPAL AND AGENT. BROKERS. See COUNTIES, 2. LANDLORD AND TENANT, 5. LIENS, 5. SALES, 4–6.

PRINCIPAL AND SURETY.

See BUILDING CONTRACTS, 1. CONTRACTS, 2. CORPORATIONS, 6, 8. GUARDIAN AND WARD. LIENS, 8.

A surety who has not paid the debt of his principal cannot maintain an action in equity to have a fraudulent conveyance by the principal set aside and the property so conveyed subjected to the payment of the debt. *Ellis v. S. W. Land Co.* 313

PRIVILEGED COMMUNICATIONS. See WITNESSES, 2, 3.

PROCESS.

See ATTACHMENT, 1. LIS PENDENS, 1.

1. Under sec. 2640, Stats. 1898 (providing that the application for an order directing service by publication shall be based upon the complaint and an affidavit, "together showing the facts required to exist"), such facts must be shown to exist at the time the order is made, i. e. the order must follow the affidavit within a reasonable time. An affidavit made two weeks before the order, based in part on a sheriff's return filed six weeks prior, is *held* in this case

not a sufficient foundation to support the order. *Roosevelt v. Land & River Co.* 653

2. Sec. 2641. Stats. 1898, which makes the order presumptive proof of the existence of all facts required to exist, etc., does not apply in such a case, where the record shows that the order was made upon insufficient proof. *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See MASTER AND SERVANT, 6. NEGLIGENCE, 1, 2. STREET RAILWAYS, 1–4, 7, 8.

PUBLICATION of summons. See PROCESS.

PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1–8.

PUBLIC POLICY. See INSURANCE, 17.

PUBLIC SCHOOLS. See MUNICIPAL CORPORATIONS, 9.

QUO WARRANTO. See OFFICERS.

RAILROADS.

See STREET RAILWAYS.

Injuries to employees: Contributory negligence: Assumption of risk.

1. Plaintiff's intestate, a brakeman on an east-bound train which had been stopped by some obstruction while passing from the main track onto a side track at a station, about midnight, was sent back about half a mile to the west with lanterns and torpedoes to signal any train coming from that direction. By the rules of the company a red lantern placed between the tracks was a danger signal, requiring all trains to stop. Meanwhile, the obstruction being removed, the train passed onto the side track, and another train, which had come from the east, started westward. The intestate had then been gone about fifteen minutes. It did not appear whether or not the engineer of the west-bound train had any knowledge respecting him. His red lantern was standing between the rails about half a mile west of the station, and his white lantern outside of the rails. The track from the station to this point was straight and the lanterns in plain sight. The west-bound train had acquired a velocity of ten or fifteen miles an hour when it ran over the lanterns, breaking the red one, and ran over and killed the intestate, who must have been struck within a few feet of the lanterns. There was no evidence as to the giving of any signals. *Held* that, as a matter of law, the deceased must have had knowledge of the approaching train and have been guilty of contributory negligence. WINSLOW, J., dissents. *Buckmaster v. C. & N. W. R. Co.* 353

2. As a locomotive was backed out of the roundhouse the fireman, who had never before made a trip on that particular engine, called the engineer's attention to the absence of the proper metallic shield on the indicator glass of the lubricator, telling him he must get a shield, and the engineer promised to do so. The place to procure a shield was at the roundhouse. The fireman knew fully the danger of leaving the glass unguarded. The engine did not start on its trip until about two hours later, during which time it was located at some distance from the roundhouse, and the fireman was with it, working about the cab, with every opportunity to observe whether the shield was put in place or not; and when the engine started on its trip he must have known that the glass was still unguarded. About three hours later, during the trip, the glass exploded, causing injury to the fireman. *Held*, that he had assumed

the risk. The reasonable time during which, if at all, he might continue in the service upon the faith of the engineer's promise to procure the shield, expired when the engine started on its trip. *Albrecht v. C. & N. W. R. Co.* 530

3. Whether in such case the engineer stood in the master's place in respect to guarding the glass so as to provide a reasonably safe place in which the fireman might work, so that the fireman had a right to continue at work upon the faith of the engineer's promise, is considered but not decided. *Ibid.*

Injuries to trespassers on trains: Intent.

4. A railway company is not obliged under all circumstances to stop its train before requiring a wilful trespasser thereon to cease his unlawful conduct. *Bolin v. C., St. P., M. & O. R. Co.* 333

5. If a railway train be not going at a dangerous rate of speed for a trespasser thereon to leave it, having regard to existing circumstances and the general custom of persons of his class in respect to boarding and leaving such trains while moving, and he cease the trespass by jumping from the train pursuant to the command of a trainman unaccompanied by any act of such trainman reasonably calculated to cause such trespasser to lose his self-control, the circumstances will not tend to show intent on the part of such trainman to commit a wilful injury. *Ibid.*

6. If a trainman command a wilful trespasser, riding on the bumpers of a freight train moving at the rate of four or five miles an hour, and whom such trainman has reasonable ground to believe is skilled in jumping on and off trains under the existing circumstances, no means reasonably calculated to cause such trespasser to lose his self-control being used to enforce the command, an intention to injure such trespasser, necessary to a wilful injury, cannot reasonably be inferred therefrom. *Ibid.*

RAPE. See CRIMINAL LAW, 1, 4, 8.

RATIFICATION. See COUNTIES, 2. LANDLORD AND TENANT, 2.

REAL-ESTATE BROKERS. See BROKERS. LANDLORD AND TENANT, 5.

REAL PROPERTY. See ATTACHMENT. BROKERS. CUSTOMS. EJECTMENT. FRAUDULENT CONVEYANCES. GUARDIAN AND WARD. HIGHWAYS. INJUNCTIONS, 2. LANDLORD AND TENANT. LIENS. LIMITATION OF ACTIONS, 1, 2. LIS PENDENS. MASTER AND SERVANT, 3. MORTGAGES. REFORMATION OF INSTRUMENTS. TAXATION. TRUSTS. VENDOR AND PURCHASER. VERDICT, 3. WATERS. WILLS, 3.

REASONABLE DOUBT. See CRIMINAL LAW, 7.

REASSESSMENT. See MUNICIPAL CORPORATIONS, 4–8.

RECEIPT. See PAYMENT, 1, 2.

RECEIVERS. See GARNISHMENT, 2. VENDOR AND PURCHASER.

RECORDING ACTS. See EJECTMENT, 2–4.

REDEMPTION from tax sales: Custody of moneys. See TAXATION, 2.

REFEREE'S findings. See APPEAL, 11.

REFORMATION OF INSTRUMENTS.

See CONTRACTS, 4.

1. Solemnly executed instruments are not to be set aside or reformed except upon evidence sufficient to establish mistake or fraud so clearly as to leave no substantial doubt. *Baumann v. Lupinski*, 451

2. A finding of the trial court that an absolute conveyance of land by a person since deceased to one of her daughters was obtained by fraud of the grantee, and that it should be reformed so as to impose upon it a reservation of the payment of certain sums to other daughters, is *held* to be unsupported by the evidence (stated in the opinion), which fully establishes the intentional execution of the deed without reservation or condition. *Ibid.*

3. Declarations consistent with a mere promise on the part of the grantee that certain sums shall be paid are of themselves, alone, insufficient to establish that a reservation or condition was intended to be incorporated in a deed. *Ibid.*

REMEDIES: Concurrent. See JUDGMENT, 3, 4.

RESCISSION. See CONTRACTS, 5.

RESERVATIONS. See REFORMATION OF INSTRUMENTS, 2, 3.

RESIDENCE. See OFFICERS.

RETURN on appeal. See APPEAL, 7.

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REVIEW on appeal. See APPEAL, 9–13.

RIGHT OF WAY. See STREET RAILWAYS, 18–21.

ROADS AND STREETS. See CUSTOMS. HIGHWAYS. MUNICIPAL CORPORATIONS, 2–8. STREET RAILWAYS, 17–21.

RULES OF COURT.
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Circuit Court Rule XI, sec. 6 (Orders referring to records, etc.), 254, 255.

SALE OF LAND. See BROKERS. GUARDIAN AND WARD. LIMITATION OF ACTIONS, 1, 2. TAXATION, 3, 4. VENDOR AND PURCHASER.

SALES.

1. A written contract for the sale of beans "delivered East St. Louis" is plain and unambiguous, and parol evidence as to the meaning of the word "delivered" is not admissible. *Lippert v. Saginaw M. Co.* 512

2. Defendant sold to plaintiff a car load of beans, to be shipped immediately and delivered at East St. Louis, and on the same day plaintiff contracted to sell them to another person at said place. Three weeks later plaintiff's vendee canceled his contract because of defendant's delay in delivering the beans, and defendant afterwards admitted its responsibility for such delay, but declined to take the beans back or take charge of their sale or advise what should be done with them. Plaintiff afterwards sold them at a loss. *Held*, that defendant was liable for the damages caused by the unnecessary delay in delivering the beans. *Ibid.*

3. The recoverable damages in such a case do not include traveling expenses of plaintiff, lawyer's fees, or money paid for photographs, telegrams, exchange, etc., but are limited to such as are reasonably considered to have been in contemplation of the parties, at the time of making the contract, as the probable result of its breach. *Ibid.*

4. If a consignee of goods is at liberty, under the contract between him and the consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price, their relation is not that of principal and agent, and the consignor cannot maintain an action against the purchaser for the price. *Northern Electrical Mfg. Co. v. J. C. Wagner Co.* 584

5. A consignee may, by the terms of his agreement, be the agent of the consignor until the consigned goods are sold, and when they are sold become, as between him and the consignor, the purchaser of, and principal debtor for, the goods. *Ibid.*

6. Where, in an action by the consignor against a purchaser from the consignee, defendant claimed that at the time of his purchase the consignee was not an agent but a vendee of the plaintiff, evidence that prior to the action the plaintiff exacted payment from the consignee and drew upon the latter for the price is admissible. *Ibid.*

SCHOOLS: Death of pupil caused by defective sewer: Liability. See MUNICIPAL CORPORATIONS, 9.

SEALS. See FRAUDS, STATUTE OF.

SEISIN. See WILLS, 3.

SERVICE BY PUBLICATION. See PROCESS.

SETTLEMENT. See COMPROMISE AND SETTLEMENT. WITNESSES, 3.

SPECIAL VERDICT. See APPEAL, 17. BILLS AND NOTES, 4. NEGLIGENCE, 1, 2. STREET RAILWAYS, 1, 2, 5, 12, 13. TRIAL, 2, 3, 5, 6. VERDICT.

STANDARD FIRE POLICY. See INSURANCE, 11, 13.

STATE AND FEDERAL COURTS. See COURTS, 1. GARNISHMENT, 2.

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Constitutionality. See CRIMINAL LAW, 8. MUNICIPAL CORPORATIONS, 6.

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If, viewing a statute from the standpoint of the literal sense of its language, it is unreasonable or absurd, an obscurity of meaning exists calling for judicial construction; and if its real purpose can be discovered by looking to the act as a whole, to the subject matter with which it deals, and to its reason and spirit, and such purpose can reasonably be said to be within the scope of the language used, it must be taken to be a part of the law the same as if it were plainly expressed by the literal sense of such language. *Rice v. Ashland Co.* 189

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STREET RAILWAYS.

Negligence: Injuries to passengers.

1. In an action against a street railway company for personal injuries alleged to have been caused by negligence in the operation of the car in which plaintiff was riding, a finding of the special verdict that a prudent person engaged in the business of the defendant, who exercised the utmost care and forethought for the safety of passengers, would not have foreseen, in the light of attending circumstances, that an injury to plaintiff would be the natural and probable result of operating the car as it was operated, is *held* to be in direct conflict with a finding that the defendant's failure to exercise the highest degree of skill and care which a careful and vigilant man would observe in like circumstances was the proximate cause of plaintiff's injuries; and the verdict is therefore insufficient to support a judgment in defendant's favor. *Wanzer v. Chippewa Valley E. R. Co.* 319
2. There having been several passengers in the car, to all of whom the company owed the same duty of care and forethought, the question which should have been submitted to the jury was not whether an injury *to plaintiff* only, but whether an injury *to any of such passengers*, should have been foreseen as the natural and probable result of operating the car as it was operated. *Ibid.*
3. Upon the evidence—which tended to show, among other things, that a little after 8 o'clock on a dark, stormy evening in June, while the car was running about seven miles per hour, the motorman received a signal to stop; that he immediately sounded the gong and shut off the current; that at about the same time he no-

ticed a load of hay on the track about seventy-five or eighty feet ahead of him; that he immediately set his brake; that when about twenty feet from the load he discovered he could not stop the car with the brake, and immediately reversed the current, but the circuit breaker instantly blew out, and the car struck the load; and that the plaintiff, being frightened by the flash and explosion, followed by a crash and rattle of breaking glass, ran out, jumped off the steps while the car was still in motion, and was injured,—it is *held* that it was not error for the trial court to refuse to modify findings in the special verdict to the effect that defendant's failure to exercise the highest degree of skill and care which a careful and vigilant man would exercise was the proximate cause of the injury; that the car could have been stopped within seventy-five feet by the use of all appliances with which it was equipped, and that the motorman, by the exercise of the utmost care in performing his duty, could have avoided the collision after he observed the wagon on the track; and it was also a question for the jury whether, in view of the darkness and the liability of teams to be upon the track, the speed of the car was negligently high. *Ibid.*

4. If the collision was caused by the motorman's negligence, and the plaintiff did not attempt to leave the car until after it occurred, she would not be precluded from a recovery by the mere fact that, being nervous and frightened, she unwisely attempted to escape instead of remaining quietly in the car with the other passengers, who were unhurt. *Ibid.*

5. For the safety of their passengers, common carriers are required to exercise the highest degree of care reasonably to be expected from human vigilance and foresight, in view of the mode and character of the conveyance adopted and consistent with the practical prosecution of their business. Questions for a special verdict which, in connection with the instructions, fixed the standard of care as "the highest degree of skill and care which a careful and vigilant man would observe, in like circumstances, in the management of such business," "the utmost care and forethought for the safety of passengers," etc., are *held* erroneous. *Ibid.*

Injuries to persons crossing tracks: Infants: Contributory negligence.

6. In an action to recover for loss of the services of a boy less than seven years old who was run over and injured by a street car, the questions whether the boy was guilty of contributory negligence and whether his parents were negligent in permitting him to be alone upon the street are *held*, upon the evidence, to have been for the jury. *Holdridge v. Mendenhall*, 1

7. The excessive and negligent speed of a street car cannot be said to have been the proximate cause of the injury to a boy who unexpectedly ran in front of the car, if the motorman had no reason to expect any such action on his part and the accident would have happened in the same way had the car been going at a normal and reasonable speed. *Ibid.*

8. The evidence in this case is *held* to show that the boy unexpectedly stepped or ran in front of the car when it was only a few feet distant, and, there being no reason to say that the motorman could have anticipated such action, his failure to anticipate it cannot be called negligence. *Ibid.*

9. In an action against a street railway company for personal injuries the positive testimony of the motorman and conductor that the

gong was sounded after the former saw the plaintiff and before the car struck him, is *held* to establish that as a fact in the case, as against the negative testimony of plaintiff and other witnesses that the gong was not sounded or that they did not hear it. *Ryan v. La Crosse City R. Co.* 122

10. Plaintiff, a boy eight years and nine months old, was struck and injured by a street car while he was attempting to cross the tracks. The motorman testified that when he first saw the boy he was about fifty feet ahead of the car and from seven to nine feet from the track, and was going diagonally towards the track; that the car was not running over twelve or thirteen miles an hour; and that he cut off his current and applied his brakes as soon as possible, and sounded his gong. There was evidence tending to show that a car running at that speed could have been stopped within less than fifty feet, and that this car ran forty feet or more after striking the plaintiff. *Held*, that the question whether the motorman was negligent was one for the jury, but that there was nothing to show that he intended to injure plaintiff or that his conduct was reckless, rash, or wanton. *Ibid.*

11. The plaintiff was a boy of unusual intelligence, had lived opposite the place of the accident for two years, was accustomed to cross the tracks daily to attend school, and knew all about the situation. He had just seen a car pass on one of the tracks and knew that the cars going in the other direction (one of which struck him) ran on the other track, but did not look at all to see if a car was coming on that track, and his own testimony was contradictory as to whether he listened for it. There was nothing to prevent him from seeing the approaching car or to divert his attention. *Held*, that though he was but eight years and nine months old, he was, as matter of law, guilty of contributory negligence. DODGE and WINSLOW, JJ., dissent, being of the opinion that no conduct on the part of a boy of that age can properly be held negligence *per se* and as matter of law, and, even if the rule were otherwise, that under the circumstances in this case the question of the boy's negligence should have been submitted to the jury. *Ibid.*

12. In an action to recover damages for the death of a boy about fourteen years old who, while on the track of a street railway, was struck by a car, it was error to submit in a special verdict a question as to whether the boy was of sufficient age, capacity, and experience to understand the danger and risk of going upon the track without looking and listening, "to the same extent as an ordinary adult person." That was not an issuable fact. *Wills v. Ashland L., P. & S. R. Co.* 255

13. It was error in such case to submit the question of contributory negligence in such a way as to call upon the jury to determine whether the boy was using "such care and attention as an ordinary and careful person of the same age, understanding, and experience *should* have used," instead of such care as ordinarily careful persons of similar age and experience do use or would use under like circumstances. *Ibid.*

14. A boy nearly fourteen years old was struck and killed by a car on the track of an electric street railway. From the trestle of a railroad which crossed above the street railway he had walked in the street diagonally toward the track and then by the side of it for a short distance as the car slowly approached from behind, and then, with his head turned away from the track, looking at a train which was passing on the trestle, he moved partially sidewise

nearer and nearer to the track until the car was within a few feet, when, apparently hearing a shout from the motorman, he suddenly stepped sidewise upon the track just in front of the car. Upon the evidence (more fully stated in the opinions) it is *held:*

(1) The injury was not intentional on the part of the motorman, nor was his conduct so reckless and wanton as to evince a total disregard of the boy's safety.

(2) The boy was guilty of contributory negligence as a matter of law. DODGE and WINSLOW, JJ., dissenting as to the last point, are of the opinion that its decision is unnecessary, and also that upon the evidence the question of contributory negligence was one for the jury. *Ibid.*

Same: Adults: Right of way.

15. Plaintiff was injured while crossing the tracks of defendant's electric street railway by a car striking the wagon on which he was riding. It was admitted on the trial and found in the special verdict that neither he nor the driver of the wagon looked in that direction to see whether a car was approaching, before starting to cross the track. *Held*, as matter of law, that he was guilty of contributory negligence, notwithstanding a finding of the jury to the contrary. *Dummer v. Milwaukee E. R. & L. Co.* 589

16. It was error, in such case, to instruct the jury that, even if neither plaintiff nor the driver looked, still they were not guilty of contributory negligence if a person exercising ordinary care who had looked would have considered it safe to cross the track because the car was so far away. *Ibid.*

17. Before crossing a railway track, regardless of whether it be a steam or electric street railroad, a person should look both ways and listen for a coming car and perform that duty when and where it will be reasonably certain to effect its purpose; and diversion of attention, generally speaking, will not excuse the performance of such duty; neither will misconduct on the part of the railway company. *Tesch v. Milwaukee E. R. & L. Co.* 593

18. An ordinary traveler upon a public street where a street-car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars, has not the same right to go upon the track and compel the stopping of a car to enable him to pass over the track as the operator of the car has to delay his passage to enable the car to pass. *Ibid.*

19. The ordinary traveler has the right of way in crossing a street-car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car if its rate of speed is lawful; and if it turns out that he has miscalculated, he is not chargeable with want of ordinary care or with violating any rights of the railroad company if it is compelled to retard the motion of the car or even stop it to enable such person to cross the track; and in no event is such a person a wrongdoer so as to excuse the operator of the car from not exercising ordinary care to avoid injuring such person, though the fault of such person may preclude him from recovering damages for any injury that may result in part from his conduct. *Ibid.*

20. If a person about to cross a street-car track in the circumstances above stated, observes a car that is coming towards him at an unreasonable rate of speed, or if in the exercise of ordinary care he

ought to observe it, such care requires him to take that into consideration in determining the probability of his being able, proceeding reasonably under the circumstances, to clear the track and avoid being injured by a collision with the car. *Ibid.*

21. If a person, traveling with a horse and carriage, approaches a street crossing to pass over double street-car tracks located on the street running at right angles with that on which he is approaching, observes a car coming from the left on the track nearer him and one from the right on the other track, and stops for such cars to pass, the horse being located about ten feet from the nearest car rail, and the car from the left passes by and stops at the right-hand crosswalk and the one from the right passes over the street,— the conditions being such that he can see the farther track at the right, looking by the front end of the stationary car, from a point about 100 feet from the crossing to a point about 100 feet further to the right and can see such track in front of him to the left of the stationary car for about forty feet from the point of crossing, leaving about sixty feet of the farther track to the right out of view because of the stationary car,— and a second car is approaching from the right on the farther track, a little way behind the first car coming from that direction, and at the instant the second car passes by he looks both ways for other approaching cars and sees one coming from the left, though not dangerously near, and none coming from the right, though at the instant of taking the observation one has just passed out of view within the sixty feet of track shut out from observation by the stationary car and is approaching at a speed of ten miles an hour, an unusual rate of speed for that situation and under the circumstances, without giving any signal of its approach, and he then starts to cross the track believing the way to be safe, he is not guilty of a want of ordinary care as a matter of law. The rule requiring one to take an observation of a railroad track before attempting to cross it, reasonably calculated to acquaint him of the presence of cars in dangerous proximity to the crossing, is not in conflict herewith. *Ibid.*

Injuries to employees: Contributory negligence.

22. A motorman employed by a street railway company was directed by the company to run his car across the track of a steam railway without stopping, and assured that no accident was liable to occur thereby. He did not know that the steam-railway track was frequently used, and in crossing it without looking or listening was run into and injured by the cars thereon. In an action against the street railway company it is *held* that he was guilty of contributory negligence precluding a recovery. *Goodrich v. Chippewa Valley E. R. Co.* 829

SUBCONTRACTORS. See LIENS, 1, 2, 4–7.

SUBROGATION. See GUARDIAN AND WARD. LIENS, 1.

SUICIDE. See INSURANCE, 7, 8.

SUMMONS: Service by publication. See PROCESS.

SUPREME COURT. See APPEAL AND ERROR. MANDAMUS.

SURCHARGING account. See ACCOUNT STATED.

SURETYSHIP. See PRINCIPAL AND SURETY.

SURFACE WATERS. See WATERS.

SUSPENSION of power of alienation. See WILLS, 8.

TAXATION.

Provision for collection of tax to pay county bonds. See COUNTIES, 6, 7.

Assessment: Board of review.

1. An assessment, challenged before a board of review, needs no evidence to support it in the first instance, but must stand unless shown to be incorrect by reasonably clear and unambiguous evidence. *State ex rel. Giroux v. Lien,* 316

Redemption from tax sales: Custody of moneys.

2. Under sec. 1168, Stats. 1898, if the county clerk holds tax redemption money after the expiration of six years from the date of the sale of the property, he holds it in trust for the county treasurer or the county and not for the holder of the certificate redeemed, and the latter cannot recover such money from the clerk. *Knudtson v. Leary,* 203

Sales for taxes: Notice.

3. A county treasurer's notice of the sale of lands for taxes, stating that they would be sold at a time designated, "in the town of B.," without stating where, does not comply with sec. 1130, Stats. 1898 (providing that such notice shall state that the lands will be sold at public auction "at some public place, *naming the same,* at the seat of justice of the county"), and a deed based upon the sale conveys no title. *Midlothian I. M. Co. v. Dahlby,* 195

Tax titles: Possession: Limitations. See EJECTMENT, 2.

4. At the time of the recording of tax deeds the lands, consisting of adjoining government subdivisions, were vacant and unoccupied. Thereafter the several original owners of such lands united in building a substantial log cabin on one of the subdivisions, and used and occupied the same continuously for about eight months, keeping there a crew of men, averaging seven or eight in number, who during all of said time were engaged in prospecting for iron ore and digging test pits over the whole tract. All this took place within three years after the recording of the tax deeds. *Held,* that such possession on the part of the original owners interrupted the constructive possession of the grantees in the tax deeds and the running of the statute of limitations (sec. 1187, Stats. 1898) in their favor, and created a bar against them. *Midlothian I. M. Co. v. Belknap,* 198

TAXPAYERS' action. See COUNTIES, 8–10.

TAX TITLES. See EJECTMENT, 2. TAXATION, 3, 4.

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TITLE to land. See EJECTMENT. FRAUDULENT CONVEYANCES. GUARDIAN AND WARD. LIS PENDENS. REFORMATION OF INSTRUMENTS. TAXATION, 3, 4. TRUSTS. VENDOR AND PURCHASER. VERDICT, 3. WILLS, 3.

TORTS.

See INJUNCTIONS, 2. LIBEL. LOGS AND LUMBER, 4, 5. MASTER AND SERVANT, 5, 6. MUNICIPAL CORPORATIONS, 9. NEGLIGENCE. RAILROADS. STREET RAILWAYS. WATERS.

Where several persons are sued as jointly liable for a tort, the failure to hold one or more of them will not militate against the liability of those who are guilty. *Wyss v. Grunert,* 38

TRESPASSERS, Injuries to. See NEGLIGENCE, 5. RAILROADS, 4–6.

TRIAL.

On the pleadings. See APPEAL, 8. JUDGMENT, 1.

Arguments and conduct of counsel. See CRIMINAL LAW, 2.

Court and jury: Relative functions. See BILLS AND NOTES, 5. BROKERS. DURESS. INSURANCE, 8. JUDGMENT, 2. MASTER AND SERVANT, 6. STREET RAILWAYS, 6, 8–11, 14, 15, 21.

1. Where, as in this case, the plaintiff, upon whom the burden rests, has failed to show by any reasonably direct evidence that defendant has been guilty of any negligence which caused the injuries complained of, the court should so decide and should not, by submitting it to the jury, imply that the question is an open one. *Musbach v. Wis. Chair Co.* 57

Instructions to jury. See CRIMINAL LAW, 4–7. STREET RAILWAYS, 16.

2. Where a special verdict is taken it is not only improper but erroneous to instruct the jury generally upon the law of the case and, especially, so as to inform them of the legal effect of the answers to the questions submitted. *Musbach v. Wis. Chair Co.* 57

3. Where a special verdict is to be rendered, general rules of law governing the rights of parties should not be given to the jury in the charge so as to inform them of the effect of their answers to the questions submitted; but general instructions as to the weight of evidence, burden of proof, and the conduct of the jury generally, are proper. *Lyle v. McCormick H. M. Co.* 81

4. The refusal to give an instruction which is in part improper is not error, since under sec. 2853, Stats. 1898, it must be given without change, as requested, or refused in full. *Ibid.*

5. Where a question in a special verdict is in itself so clear and unambiguous as not to require any explanatory or qualifying charge, the omission or refusal to give an instruction of that nature is not a prejudicial error, even though the instruction was a proper one. *Ibid.*

6. A refusal to instruct a jury in accordance with suggestions contained in special questions presented for submission to them, or the giving of instructions in regard to a particular subject, is not reversible error, if, by the verdict rendered, it is clear that the facts necessary to the applicability of such instructions given or refused did not exist. *Tesch v. Milwaukee E. R. & L. Co.* 593

Computation of interest. See INTEREST.

Verdict. See VERDICT.

New trial. See NEW TRIAL.

TRIAL BY JURY. See OFFICERS, 1.

TRUSTS AND TRUSTEES.

See LIMITATION OF ACTIONS, 1. WILLS, 8.

1. In the absence of fraud, accident, or mistake the grantor will not be permitted to prove that a deed absolute on its face was given in trust for his benefit. *Fillingham v. Nichols,* 49

2. Findings of the trial court to the effect that at the time of the execution of a deed by plaintiff and her husband (since deceased) to defendant the latter executed a conveyance of the same land to plaintiff, and that afterwards, having possession of both instru-

ments, defendant fraudulently suppressed or destroyed the conveyance to plaintiff, and hence that the defendant should be compelled to convey to plaintiff or the title be vested in her by judgment, are *held* not to be supported by sufficient evidence. *Ibid.*

VALUE, Evidence of. See LOGS AND LUMBER.

VARIANCE. See PLEADING, 2.

VENDOR AND PURCHASER OF LAND.

See GUARDIAN AND WARD. LIS PENDENS.

1. The receiver of a corporation, under an order of the court, sold a land contract and notes given for the deferred payments thereon, no condition accompanying the sale. Subsequently assignees of the purchaser at such sale commenced an action to foreclose the land contract, but did not make the corporation or the receiver a party. *Held*, that the purchaser at the receiver's sale took title to the contract and notes free from claims and debts arising out of the receivership, and that the defendant could not maintain a counterclaim for damages for breach, by the receiver, of a contract for a general retainer, or for legal services performed for the receiver. *Emerson v. Schwindt*, 167

2. A court of equity should not compel the vendee in a land contract to accept, as a fulfilment of the contract, a conveyance from the vendor's assignee of the contract while the legal title remains in the vendor, who is not made a party to the action,—even though the objection that there is a defect of parties is not properly taken. *Ibid.*

3. The rule that a vendee who has gone into possession under a land contract cannot retain possession and refuse to pay the purchase money on the ground that the vendor's title is defective, does not apply to the objection that a conveyance from the vendor's assignee of the contract does not convey the legal title. *Ibid.*

VENUE. See MANDAMUS.

VERDICT.

See APPEAL, 17. BILLS AND NOTES, 4. NEGLIGENCE, 1, 2. STREET RAILWAYS, 1, 2, 5, 12, 13. TRIAL, 2, 3, 5, 6.

1. A general verdict should not be submitted in connection with a special verdict. *Wills v. Ashland L., P. & S. R. Co.* 255

2. If in taking a special verdict questions be submitted covering singly all the material controverted facts in issue, a refusal to submit other questions covering the same subjects in a different form, or covering evidentiary facts, is proper. *Tesch v. Milwaukee E. R. & L. Co.* 593

3. In view of the language used in the questions submitted for the special verdict, of the instructions given to the jury, and of the evidence returned to this court on appeal, a finding of the jury that a person promised and agreed to devise real estate is *held* to be equivalent merely to a finding of an oral promise or understanding, and not of a valid (i. e. a written) agreement, although the verdict does not specifically state that it was oral, and although the bill of exceptions is not certified to contain all the evidence. *Martin v. Estate of Martin*, 284

VOLUNTARY ASSIGNMENT. See CHATTEL MORTGAGES, 4. FRAUDULENT CONVEYANCES, 4–6.

WAIVER.
Of objections to complaint. See APPEAL, 10.
Of attachment lien. See ATTACHMENT.
Of forfeiture. See INSURANCE, 5, 6.
Of defects in proofs of loss. See INSURANCE, 10.
Of contract. See LANDLORD AND TENANT, 4.
Of defect of parties. See VENDOR AND PURCHASER, 2.

WATERS.

To relieve his farm from surface water which gathered in depressions or low places thereon defendant constructed a system of underdrainage located entirely upon his own land, through which the water was discharged on his own land near a dry run, in which it flowed across the lands of intermediate proprietors to plaintiff's land. Such underdrainage enabled defendant's land to absorb and hold more of the surface waters coming upon it, and the quantity flowing from it into the dry run and upon plaintiff's land was not increased. *Held*, that plaintiff had no cause of action. *Connell v. Stark*, 92

WILLS.

See COSTS, 3. EXECUTORS. MASTER AND SERVANT, 3.

1. In a contest as to the validity of a will the allowance to the parties of counsel fees to be paid out of the estate, in addition to statutory costs, is without authority of law; though upon the settlement of an executor's account he may receive credit for expenses of that nature properly incurred by him. *Fox v. Martin*, 99
2. If the parties to a will contest do not include all who are beneficially interested in the estate, a stipulation between them that counsel fees shall be allowed, payable out of the estate, is not binding or effective. *Ibid.*
3. Land was devised to trustees to receive the rents, issues, and profits thereof during the life of testator's son, and to pay the net income to said son during his life, and upon his death to convey the land "to his *issue then living* in fee, or, in case he shall die *without issue*, then in that case the same to descend to" the testator's heirs at law then living. The son had but one child, which died before his death. After his death his widow claimed the land. *Held:*
(1) The words "issue then living," and also the words following, "without issue," meant issue living at the time of the son's death.
(2) The trust so created was not a mere passive or dry trust such as had been abolished by statute (secs. 2073–2075, Stats. 1898). It did not entitle the son to the "actual possession of the lands and the receipt of the rents and profits thereof," as provided in sec. 2073; nor was it intended thereby to vest in him "the right to the possession and profits," as provided in sec. 2075.
(3) The trust was one expressly authorized by sec. 2081, Stats. 1898. It did not suspend the absolute power of alienation for a longer time than during the life of the son, and therefore was not repugnant to sec. 2039, R. S. 1878.
(4) The devise did not create an estate tail in the son, and it cannot therefore be adjudged, under sec. 2027, Stats. 1898, that he was seised thereof as an allodium.
(5) The son never having been seised of the land devised, it did not pass from him to his widow. *Webber v. Webber*, 626

WITNESSES.

1. Officers of a corporation which is a party to an action in which the opposite party derives his title or sustains his liability to the cause of action from, through, or under a deceased person, are not incompetent under sec. 4069, Stats. 1898, to testify in respect to transactions had by them personally with such deceased person. *Twohy Mercantile Co. v. Estate of McDonald,* 21

2. An attorney who has received from his client authority as an agent to enter into a contract with a third person and has acted thereon may testify to the giving of such authority if it comes in question. Sec. 4076, Stats. 1898, has no application to such a case. *Koeber v. Somers,* 497

3. A party is not protected by any privilege from testifying as to whether he received from his attorneys moneys paid to them by the adverse party in accordance with a settlement of the demand in suit made by said attorneys with such adverse party. *Ibid.*

WORDS AND PHRASES.

Action, in statute. See COSTS, 2.
Adverse party, in statute. See INSANE PERSONS, 2.
Alter a highway, in statute. See HIGHWAYS, 1.
Collection of tax, in statute. See COUNTIES, 6.
Commencement of action, in statute. See ACTION.
Complete plans, in statute. See COUNTIES, 4.
Costs from the time of the offer, in statute. See COSTS, 1.
County buildings, in statute. See COUNTIES, 5.
Cruel and unusual punishments, in constitution. See CRIMINAL LAW, 8.
Delivered, in contract. See SALES, 1.
Duly made, in pleading. See INSURANCE, 3.
Executor. See EXECUTORS, 1.
Expressing the consideration, in statute. See FRAUDS, STATUTE OF.
General and ordinary business of a corporation, in statute. See INJUNCTIONS, 2.
Issue then living, in will. See WILLS, 3.
Lowest bidder, in statute. See COUNTIES, 3.
Occasioned by illegal employment, in policy. See INSURANCE, 19.
On premises, in statute. See INSURANCE, 18.
Party, in statute. See WITNESSES, 1.
Place of sale, in statute. See TAXATION, 3.
Possession of land, in statute. See TAXATION, 4.
Price, in testimony. See LOGS AND LUMBER, 6.
Professional employment, in statute. See WITNESSES, 2.
Proximate cause. See NEGLIGENCE, 2.
Public official proceeding, in statute. See LIBEL, 1.
Received payment in full. See PAYMENT, 2.
Recovery of real property, in statute. See LIMITATION OF ACTIONS, 2.
Except *rent*, in contract. See CONTRACTS, 2.
Showing the facts required to exist, in statute. See PROCESS, 1.
Trial. See APPEAL, 8.
Upon the same contract, etc., in statute. See MORTGAGES, 2.
Without issue, in will. See WILLS, 3.

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